TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1963

No. [redacted] 13

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL 1625, AFL-CIO, ET AL., PETITIONERS,

vs.

ALBERTA SCHERMERHORN, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

PETITION FOR CERTIORARI FILED AUGUST 26, 1963
CERTIORARI GRANTED NOVEMBER 12, 1963

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 368

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL 1625, AFL-CIO, ET AL., PETITIONERS,

vs.

ALBERTA SCHERMERHORN, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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[fol. 1]

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT

IN AND FOR DADE COUNTY, FLORIDA

IN CHANCERY

No. 60C11562

ALBERTA SCHERMERHORN, LOIS DEVITA, JOYCE E. THURO, and LARRY STARK, individually, as well as in a representative capacity on behalf of each and all other persons of a multitudinous class to which they belong and which is similarly situated, Plaintiffs,

vs.

LOCAL 1625 OF THE RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO; WILLIAM TRAVIS, President of Local 1625 of the Retail Clerks International Association, AFL-CIO; and FOOD FAIR STORES, INC., SOUTHERN DIVISION, a Pennsylvania Corporation, registered to do business in the State of Florida, Defendants.

COMPLAINT FOR INJUNCTION AND OTHER RELIEF

Come Now the Plaintiffs, by and through their undersigned attorney, and say:

1. The plaintiffs, Alberta Schermerhorn, Lois Devita, Joyce E. Thuro and Larry Stark, are each citizens and residents of Broward County, State of Florida. All the plaintiffs, with the exception of Larry Stark, are over the age of twenty-one (21) years. All plaintiffs are regular, permanent employees of the defendant Employer, Food Fair Stores, Inc., Southern Division, engaged in either full or part time employment at the Food Fair store, 1510 S. Federal Highway, Hollywood, Florida. Plaintiff Alberta Schermerhorn has been employed by the Defendant Employer for over seven (7) years.

2. This action is brought by the plaintiffs, individually, as well as in a representative capacity on behalf of each

and all other persons of a multitudinous class to which they belong and which is similarly situated. Said class consists of more than nineteen hundred (1900) fellow employees of the defendant and its subsidiaries. The number of persons who have a common interest in the questions involved in this action is so great as to make it impractical, [fol. 2] difficult or impossible to bring them all before the Court in a joint Complaint. The named plaintiffs, having the same interests as each member of the class, fairly represent the class in the presentation of this action.

3. The plaintiffs are advised and believe, and therefore allege, that the defendant employer is a corporation with its principal office and place of business in Dade County, Florida, and operates its business as a super-market chain store operation on an extensive basis within this state. That in order to perform the normal operations of its business, the defendant employer employs in this State a large number of persons, including each of the plaintiffs, and others similarly situated whom the plaintiffs fairly represent. Upon information and belief, the plaintiffs allege that the defendant employer employs at its various supermarkets and places of business in this state others, classifications of workers such as dairy men, stockroom help, produce help, grocery and front-end employees.

4. On information and belief, the plaintiffs allege that the defendant, William Travis, is the President of the defendant Union, Local 1625 of the Retail Clerks International Association, AFL-CIO. That the defendant Union includes in its membership, cashiers, bag-boys, stockroom help, produce help, grocery and front-end employees, and others, many of whom are employees of the defendant employer.

5. The defendant Union has entered into a written agreement with the defendant employer wherein the defendants reached an agreement on the terms of a collective bargaining contract dealing with wages, hours and working conditions. This contract, the entire terms of which are unknown to the plaintiffs, will run until April 15, 1963. The defendant employer and defendant Union have posted a Notice

at the plaintiffs' places of employment pertaining to the agreement reading as follows: (See Exhibit A)

> "There is a clause in the agreement, however, which both Management and the Union desire to call specifically to your attention. Article 19 of the agreement provides for the establishment of an Agency Shop. Because many of you may not be too familiar with the meaning and purpose of an Agency Shop, a few [fol. 3] words of explanation may be in order.
>
> The Agency Shop recognizes that union membership in the State of Florida is a voluntary act of the employee. On the other hand, under an Agency Shop Agreement, those Employees who do not become members of the Union nevertheless are required to pay the necessary service fees to the Local Union in order to aid the Union in meeting its authorized expenses as the exclusive bargaining agent.
>
> Therefore, the Company and the Union have agreed that *even though you may not have joined the Union, you are obligated, under the provisions of the Agency Shop, to pay an initial service fee which is the equal of the initiation fee for Union members and a monthly service fee which is the equal of the monthly dues for those who voluntarily become Union members.* Note: An Employee who pays the regular initial fee and regular monthly service fee but does not voluntarily join the Union, does not participate in the internal union affairs even though said Employee receives equal treatment under the contract.
>
> The Company and the Union have agreed upon the Agency Shop Provision because we believe it is democratic, just and equitable for all the parties concerned." (Emphasis Added)

6. That the Agency Shop Clause, otherwise known as Article 19 of the Agreement entered into by and between the defendant Employer and the defendant Union, reads as follows: (See Exhibit B)

> "Employees shall have the right to voluntarily join or refrain from joining the Union. *Employees who*

choose not to join the Union, however, and who are covered by the terms of this contract, *shall be required to pay as a condition of employment*, an initial service fee and monthly service fees to the Union for the purpose of aiding the Union in defraying costs in connection with its legal obligations and responsibilities as the exclusive bargaining agent of the employees in the appropriate bargaining unit. The aforesaid fees shall be payable on or before the first day of each month, and such sums shall in no case exceed the initiation fees and the membership dues paid by those who voluntarily choose to join the Union. Other than the payment of these service fees, those employees who do not choose to join the Union shall be under no further financial obligations or requirements of any kind to the Union. It shall also be a condition of employment that all employees covered by this Agreement shall on the 30th day following the beginning of such employment or the effective date of this agreement, whichever is later, pay established initial and monthly service fees as shown above." (Emphasis Added)

7. Each of the plaintiffs, and all other employees of the defendant employer similarly situated and whom they represent in this action, have the right to work free from restraints and coercion which would be imposed on them in the event the defendants seek to enforce the Agency Shop [fol. 4] provisions of the Union-Employer agreement. The Constitution of the State of Florida, Declaration of Rights, #12, provides that:

> "The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union, or labor organization; * * * "

The Legislature of the State of Florida, Florida Statute 447.01, has declared that *the right to work is the right to live;* and the working man, unionist or non-unionist, must be protected.

8. That the plaintiffs are not and do not want to be members of the Union. The plaintiffs do not want to participate in any Agency Shop relationship and they do not want to pay the defendant Union any dues or service fees or initiation fees.

9. That some of the plaintiffs have heretofore paid to the Union, *under protest,* an "initial service fee" and will be compelled, under protest, by the Union, to pay a monthly service fee of $2.00 to $4.00 a month.

10. That the Agency Shop Clause is being enforced by the defendant Union, the defendant President of the Union, and the Union's representatives and agents. The plaintiffs have been orally advised within the past two (2) weeks that if the plaintiffs do not join the Union or pay the initial service fees and monthly service fees, that they will be discharged by the defendant Employer. *The plaintiffs are, in effect, being blackmailed by the defendant Union to either pay money or lose their jobs.* The Agency Shop Provision is undemocratic, unjust and in violation of the established and declared public policy of the State of Florida.

11. That the enforcing and carrying out of the Union-Agency Shop Provision, as aforesaid, between the defendants, making the payment of sums of money to a Union, a condition of employment, is unlawful and illegal, and it would cause the plaintiffs to suffer serious and irreparable damage and injury, for which there could be no adequate remedy at law and the only remedy which would afford them adequate and proper relief is the injunctive process of this court.

Wherefore the plaintiffs pray:

1. That this Court take jurisdiction of the parties and [fol. 5] the subject matter of this cause.

2. That until the final hearing of this cause, a temporary restraining order be issued restraining the defendants and each of them, their officers, agents, servants, employees and attorneys, and those in active concert or participation with them:

(a) From carrying out or enforcing any Agency Shop or similar provision, or any contract or agreement, calling for a Union Shop, Agency Shop, or similar arrangement, whereby the payment of an initial service fee and/or monthly service fee or charge to a Union, is made a condition of continued employment or of employment.

(b) From inducing, encouraging, aiding, ordering, or causing employees of the defendant Employer to discharge the employee plaintiffs as a means of forcing the defendant Employer to enforce any such agreement or provision.

(c) From ordering a strike or lockout of the employees as a means of enforcing any such agreement or provision.

(d) From aiding or procuring or causing to be done any act which they or any of them may be enjoined or restrained from doing.

3. That on a final hearing of this action, the Court enter a Final Decree finding and declaring that the aforesaid Agency Shop Provision or agreement as agreed upon between the defendant Union and the defendant Employer is in violation of contractual rights vested in the plaintiffs under their oral contracts of employment with the defendant employer, and is null and void and unenforceable and restraining and enjoining the defendants and each and every one of them, their agents, servants, employees and representatives, from in any manner, directly or indirectly, violating the Right-to-Work Constitutional and Statutory rights of the plaintiffs, by denying or abridging employment at Food Fair to any of the plaintiffs, or the class, or group similarly situated, on account of their membership or non-membership in any labor union, organization or association; and more specifically, from carrying out a contract, agreement or understanding, express or implied, whereby the defendant Employer would maintain a Union [fol. 6] and/or Agency Shop and from taking any action, concerted or otherwise, either directly or indirectly, to coerce, compel, force, persuade, induce, intimidate, or encourage the defendant Employer to discharge the plaintiffs.

4. That on a final hearing of this action, the Court find and determine that the defendant Union is not entitled to receive and should not have received any initial service fees or monthly service fees from plaintiffs or other non-Union employees of the defendant Employer; that the defendant Union and the defendant President of the local Union should account for all the monies so received by them, and return all the monies so received to the plaintiffs and the non-Union member employees of the defendant Employer.

5. That the Court grant such other and further relief as the plaintiffs may be entitled to and that upon a final hearing said injunction may be made permanent, and the plaintiffs may have at that time such other and further relief as they may be entitled to, including but not limited to damages, attorney's fees, and court costs.

Bernard B. Weksler, Attorney for Plaintiffs, 509 Industrial National Bank Building, Miami, Florida.

Alberta Schermerhorn, Lois Devita, Joyce E. Thuro, Larry Stark.

Duly sworn to by Alberta Schermerhorn, jurat omitted in printing.

[fol. 7]

EXHIBIT "A" TO COMPLAINT

IMPORTANT NOTICE TO EMPLOYEES

(AGENCY SHOP PROVISION)

Local 1625 of the Retail Clerks International Association, AFL-CIO, your sole bargaining agent, and Management, have reached agreement on the terms of a collective bargaining contract dealing with wages, hours and working conditions. This contract, which was duly ratified, will run until April 15, 1963. We believe the contract is fair to the Employees and Management and will result in a harmonious and stable relationship. Both management and

the Union sincerely hope that you will take time out to read the contract and acquaint yourselves personally with the excellent benefits and details.

There is a clause in the agreement, however, which both Management and the Union desire to call specifically to your attention. Article 19 of the agreement provides for the establishment of an Agency Shop. Because many of you may not be too familiar with the meaning and purpose of an Agency Shop, a few words of explanation may be in order.

The Agency Shop recognizes that union membership in the State of Florida is a voluntary act of the employee. On the other hand, under an Agency Shop Agreement, those Employees who do not become members of the Union nevertheless are required to pay the necessary service fees to the Local Union in order to aid the Union in meeting its authorized expenses as the exclusive bargaining agent.

Therefore, the Company and the Union have agreed that even though you may not have joined the Union, you are obligated, under the provisions of the Agency Shop, to pay an initial service fee which is the equal of the initiation fee for Union members and a monthly service fee which is the equal of the monthly dues for those who voluntarily become Union members. Note: An Employee who pays the regular initial fee and regular monthly service fee but does not voluntarily join the Union, does not participate in the internal union affairs even though said Employee receives equal treatment under the contract.

The Company and the Union have agreed upon the Agency Shop Provision because we believe it is democratic, just and equitable for all the parties concerned.

/s/ HAROLD FRIEDLAND
The Management

/s/ FRED J. KHOURY
The Union

[fol. 8]

EXHIBIT "B" TO COMPLAINT

AGENCY SHOP CLAUSE

"Employees shall have the right to voluntarily join or refrain from joining the Union. Employees who choose not to join the Union, however, and who are covered by the terms of this contract, shall be required to pay as a condition of employment, an initial service fee and monthly service fees to the Union for the purpose of aiding the Union in defraying costs in connection with its legal obligations and responsibilities as the exclusive bargaining agent of the employees in the appropriate bargaining unit. The aforesaid fees shall be payable on or before the first day of each month, and such sums shall in no case exceed the initiation fees and the membership dues paid by those who voluntarily choose to join the Union. Other than the payment of these service fees, those employees who do not choose to join the Union shall be under no further financial obligations or requirements of any kind to the Union." It shall also be a condition of employment that all employees covered by this Agreement shall on the 30th day following the beginning of such employment or the effective date of this agreement, whichever is later, pay established initial and monthly service fees as shown above.

[fol. 9]

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT

IN AND FOR DADE COUNTY, FLORIDA

IN CHANCERY

[Title omitted]

MOTION TO DISMISS

Come Now the Defendants, Local 1625 of the Retail Clerks International Association, AFL-CIO, and William Travis, President thereof, by their undersigned counsel and move the court to dismiss the Complaint herein upon the following grounds:

1. This court lacks jurisdiction of the subject matter of the cause for the following reasons:

(a) The Complaint on its face shows that the contract does not violate Section 12 of the Declaration of Rights of the Florida Constitution or any of the statutes of Florida and therefore this court has no further jurisdiction in the cause, the Labor-Management Relations Act of 1947, as amended, having preempted the field of labor relations.

(b) The exclusive jurisdiction to determine whether or not the Agency Shop contract referred to in the Complaint violates Section 12 of the Declaration of Rights of the Florida Constitution or statutes of Florida, lies with the National Labor Relations Board since such a violation would constitute a violation of the Labor-Management Relations Act of 1947, as amended.

[fol. 10] 2. The Complaint fails to state a cause of action for the following reasons:

(a) The Complaint on its face shows that the named Plaintiffs do not constitute a class.

(b) The Complaint on its face shows that the contract complained of does not require membership in a Union and therefore does not violate Section 12 of the Declaration of Rights of the Florida Constitution or any of the statutes of Florida.

(c) The Complaint on its face fails to allege any ground of equitable relief and fails to allege facts showing irreparable damage to the Plaintiffs.

Claude Pepper Law Offices, By Claude Pepper, Attorneys for above Defendants.

Of Counsel: S. G. Lippman, Kaplan, Ser, and Abrams.

Certificate of Service (omitted in printing).

[fol. 11]

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT

IN AND FOR DADE COUNTY, FLORIDA

IN CHANCERY

No. 60C 11562

[Title omitted]

RESPONSE TO APPLICATION FOR TEMPORARY INJUNCTION

Come now the defendants, Local 1625 of the Retail Clerks International Association, AFL-CIO, and William Travis, by and through their undersigned counsel, and in opposition to the Application for Temporary Injunction state the following:

1. The application for temporary injunction should be denied based on matters set forth in Motion to Dismiss filed this day with this Court and for the following additional reasons:

a. Serious question exists as to the Court's jurisdiction of the subject matter and, as plainly appears on the face of the agency shop provision of the contract, does not in any respect violate Sec. 12 of the Florida Constitution.

b. Plaintiffs will not suffer any irreparable injury pending the final adjudication by this Court. All that is involved is the payment of nominal sums of money not exceeding $3.50 per month for each plaintiff.

c. Plaintiffs do not in fact represent any class since in excess of 1500 employees have voluntarily become members of the Union and have approved the contract. Plaintiffs' depositions show that they are only authorized to speak on behalf of themselves.

[fol. 12] d. A temporary injunction will have a serious effect on harmonious labor relations presently existing between management and the Union and its denial, however, will have no consequential effect.

e. Plaintiffs in seeking a temporary injunction seek to upset the status quo, rather than to maintain it, since they seek to enjoin the operation of an existing contract.

f. Similar agency shop provisions are found in numerous agreements throughout the State of Florida and in the Greater Miami area. An adverse decision would, therefore, affect numerous employers and thousands of employees and upset stable labor relations involved.

g. The instant matter represents a case of first impression in this state and requires full and mature consideration by this Court, which can only be obtained after a final hearing. Courts of other states which have considered the matter have determined that the agency shop does not violate "right to work" enactments similar to Sec. 12, Florida Constitution.

h. The agency shop provision involved herein is an integral part of the contract and any impairment or interference with its operation could have the effect of nullifying the entire agreement and throwing labor relations into a state of confusion and uncertainty.

i. Plaintiffs in seeking a temporary injunction are requesting the same type of relief to which they would be entitled only after a full hearing should they prevail.

For the foregoing reasons and others which may be presented to the Court, it is respectfully urged that plaintiffs' application for a temporary injunction should be denied.

Claude Pepper Law Offices, Attorneys for Local 1625, R.C.I.A., AFL-CIO and William Travis, 1701 Meridian Avenue, Miami Beach 39, Florida, JE 2-4853, By Claude Pepper.

Of counsel: S. G. Lippman, Kaplan, Ser & Abrams.

[fol. 13] Certificate of Service. (omitted in printing).

[fol. 14]

Agreement Between
the
R. C. I. A. Local # 1625
and
Food Fair Stores, Inc.
and
Frederich's Markets

MIAMI
DADE COUNTY
FLORIDA.

MCM 56

This Agreement made and entered into this 11th day of July, 1960, by and between Food Fair Stores, Inc. of Miami and Frederich's Markets, hereinafter referred to as the Employer, and the Retail Clerks Union, Local No. 1625, chartered by Retail Clerks International Association, AFL-CIO, hereinafter referred to as the Union, and any renewal or extension thereof, shall be binding upon the parties hereto, their heirs, executors, administrators, successors and assigns.

Article 1—Intent and Purpose

It is the intent and purpose of the parties hereto that this Agreement shall promote and improve the industrial relationship between the Employer and the Union and so set forth herein rates of pay, hours of work, and working conditions to be observed between the parties.

Article 2—Coverage

The Employer hereby recognizes the Union as the sole and exclusive bargaining agent for a unit consisting of all employees in the Employer's present and future retail food stores located in the counties of Dade, Broward, Monroe, St. Lucie and Palm Beach, State of Florida, with respect to rates of pay, wages, hours, and all other conditions of employment EXCEPT employees working in the meat department of the Employer's retail stores, Store Managers, and Assistant Store Managers.

Article 3—Union Security Provision

If, during the life of this Agreement or any renewal or extension thereof, the laws of the State of Florida are changed or amended to make Union-Shop Agreements valid, or should minimum wage and hour laws be changed to cover employees in this collective bargaining Agreement, such an Agreement shall become effective immediately and become a part of this Agreement or any renewal or extension thereof.

Article 4—Management

The management of the business and the direction of the employees, including the right to plan, direct, and control store operations, hire, suspend or discharge for just cause, transfer or relieve employees from duty because of lack of work or for other legitimate reasons, the right to introduce new or improved methods or other facilities and the right to establish and maintain reasonable rules and regulations covering the operation of the stores, a violation of which shall be among the causes for discharge, are vested in the Employer, provided that this right shall not be used for the purpose of discrimination against any employee.

Article 5—Non-Discrimination

The Employer agrees it will not discriminate against any employee because of union membership, or because of any union activity.

Article 6

Grievance and Arbitration Procedure

SECTION 1. The Employer and the Union shall make a sincere effort to settle promptly any differences, disputes or complaints arising over the interpretation or application of the contents of this Agreement through the following steps:

STEP ONE: By conference between the aggrieved employee, the Steward, and the store manager within five (5) days after the happening of the event causing the grievance. If the grievance is not settled within three (3) days, it shall be processed in Step Two.

STEP TWO: By conference between the Steward and/or Business Agent with the Store Manager and District Supervisor. If the grievance is not settled within three (3) days, it shall be processed in Step Three.

STEP THREE: The Union shall immediately submit in writing all pertinent facts pertaining to the grievance to the Personnel Manager, and within three (3) days the conference shall be held between the representatives of the Union and the Personnel Manager and/or a representative of the Employer. If the grievance is not settled within five (5) days, it shall be referred to Arbitration.

SECTION 2. The Union and the Employer each shall appoint a representative to meet in an effort to settle the grievance.

If the representative of the Union and the representative of the Employer fail to settle satisfactorily the complaint within forty-eight (48) hours, those two persons shall request the Federal Mediation and Conciliation Service to provide a panel of persons from which an Arbitrator shall be selected by alternative striking by the two representatives. This Arbitrator so selected shall constitute the Board of Arbitration, and his decision shall be binding on both parties. The expense incurred in the Arbitration proceedings such as hearing room, stenographer, transcript for each party and the Arbitrator's fees shall be divided equally between the Union and the Employer.

SECTION 3. No grievance shall be considered unless the procedure outlined above is followed.

SECTION 4. Upon request, the store manager will grant to any accredited union representative the right to communicate with the employees of the store.

SECTION 5. The Employer shall have the right to call a conference with the Steward or representative of the Union for the purpose of discussing grievances, criticisms or other problems.

Article 7

Discharge - Demotion - Promotion

SECTION 1. The power of discharge and discipline for just cause, to promote and

demote, lies with the Employer. It is agreed that this power shall be exercised with justice with regard to the right of the employees and that this power will not be used to discriminate against any employee.

SECTION 2. The power to discharge and discipline for just cause, to promote and demote, shall be subject to the grievance procedure. If such grievance is decided in favor of the employee, he shall be entitled to reinstatement and if the Arbitrator decides that the employee is entitled to pay for lost time, such pay will not exceed the straight time pay for the basic workweek.

SECTION 3. The Employer will give the Union notice of all discharges and layoffs within one (1) week of the employee's discharge or layoff. Notices shall be mailed to the Union headquarters.

Article 8—Stewards

SECTION 1. It is understood that the Stewards of the Union, at all times shall be regular full-time employees, and the Union shall furnish the Employer with a complete list of Stewards, which shall be supplemented from time to time as may be necessary.

SECTION 2. The Stewards or other individual employees covered hereby shall not be considered agents of the Union for the purpose of calling strikes or causing shutdowns or in any other way interfering with the normal operations of the store.

SECTION 3. On layoffs and transfers Stewards shall enjoy super-seniority. The Chief Steward in each store shall be the last employee to be transferred or laid off.

Article 9

Absenteeism, Tardiness, Company Rules

SECTION 1. The Union agrees to uphold the rules and regulations of the Employer in regard to punctual and steady attendance, proper and sufficient notification in case of necessary absence, and conduct on the job.

SECTION 2. The Union agrees to cooperate with the Employer in maintaining and improving safe working conditions and practices, in improving the cleanliness and good housekeeping of the stores and in caring for equipment.

SECTION 3. The Union agrees to cooperate in the correction of inefficiencies of members which might otherwise necessitate discharge.

SECTION 4. The Union and its members agree to make an earnest effort to recommend new employees to the Employer and to aid in decreasing labor turnover in the stores.

SECTION 5. The Union recognizes the need for conservation and the elimination of waste and agrees to cooperate with the Employer in suggesting and practicing methods in the interest of conservation and waste elimination.

Article 10—Effect of Invalidity

SECTION 1. The parties hereto agree that should any Article, part or paragraph of this Agreement be declared by a Federal or State Court of competent and final jurisdiction in the premises to be unlawful, invalid, ineffective or unenforceable, said Article, part or paragraph shall not effect the validity and enforceability of any other Article, part or paragraph hereof, and the remainder of this Agreement shall continue in full force and effect.

SECTION 2. The parties also agree to renegotiate any Article, part or paragraph of the Agreement that has been declared unlawful, invalid, ineffective or unenforceable as specified above.

Article 11—Vacations

SECTION 1. A vacation of one (1) week with pay, shall be granted to all regular full time employees with at least one (1) year, but less than two (2) years of continuous service on the job with Employer.

SECTION 2. A vacation of two (2) weeks with pay shall be granted to all regular full time employees with two (2) years or more of continuous service on the job with Employer.

SECTION 3. Beginning with the vacation period of April 1, 1961, a vacation of three (3) weeks, with pay, shall be granted to all regular full time employees with ten (10) years or more of continuous service on the job with Employer. Employees shall

take two weeks of the three weeks vacation during consecutive weeks. The third week need not be consecutive, but shall be scheduled by mutual agreement with the Employer.

SECTION 4. Vacation pay is to be based on the regular weekly hours multiplied by the straight time hourly rate for all regular full time employees.

SECTION 5. An employee shall become eligible for vacation following his anniversary date of employment and may receive his vacation at any time between April 1st and October 31st, but not later than his succeeding anniversary date of employment.

SECTION 6. In the event the services of an employee are terminated for any reason, voluntary or involuntary, except discharge because of dishonesty, after the vacation has been earned but before it has been received, there shall be paid to such employee salary covering the period of vacation to which he is entitled upon termination of services.

SECTION 7. Employees are entitled to receive their vacation pay at the beginning of their vacation period.

SECTION 8. Employees who, having qualified for a vacation, become disabled prior to having received their vacation, may upon request to the Company receive their vacation pay.

SECTION 9. Every reasonable effort shall be made to schedule vacation dates

in line with the employee's desire, but subject to the needs of the business. Employees shall be given the opportunity to choose vacation dates on the basis of their length of service.

SECTION 10. Employees entitled to vacation will not be allowed to take money instead of vacation.

SECTION 11. All time worked for Food Fair shall be credited for vacation benefits.

SECTION 12. If a holiday falls during an employer's vacation period, said employee shall receive one (1) extra day off with pay.

SECTION 13. An employee working for a competitor (grocery and/or meat) during his vacation period shall be considered to have voluntarily quit his employment with the Company.

Article 12—Holidays

SECTION 1. The following shall be recognized as holidays: New Year's Day, Labor Day, Christmas Day, Fourth of July, Thanksgiving Day and Memorial Day, or days legally celebrated in lieu thereof.

SECTION 2. A full time employee who works his scheduled day before and his scheduled day after one of the holidays listed above shall receive one-fifth (1/5) on one (1) week's pay at his straight time hourly rate.

SECTION 3. An absence due to proven illness on the employee's scheduled work-

day before or after the holiday shall not disqualify the employee for his holiday pay.

SECTION 4. An employee who works on any of the holidays listed above shall be paid one and one-half (1½) times his regular rate of pay for all hours worked on the holiday and, in addition, he shall receive the holiday pay provided for in paragraph two (2) above if he qualfiies for such holiday pay.

SECTION 5. The workweek during which any of the above specified holidays fall shall be four-fifths (4/5) of the established workweek for all regular full time employees covered by this Agreement.

SECTION 6. The holiday period shall be considered as starting at midnight and ending at midnight.

Article 13—Part-Time Benefits

SECTION 1. Part-time employees shall be offered the opportunity for full-time employment when an opening occurs in preference over new applicants.

SECTION 2. Regular part-time employees working thirty (30) hours or more per week consistently during the year, shall be considered as regular full-time employees for the purpose of vacations, holidays and welfare programs.

Article 14—Leave For Pregnancy

SECTION 1. A full-time female employee shall be considered to be unable to

perform her work after the fifth (5) month of pregnancy. If she has at least one (1) year of full-time continuous employment, she will be granted a leave of absence upon her written request accompanied with proper statement from attending physician. She shall return to work not later than the end of the fourth (4) month after the birth and if she does not return to work within the four (4) months after birth, she shall be considered to have voluntarily resigned as of the last day worked.

SECTION 2. In returning to work she shall be returned to the store from which she left provided her length of service is greater than employees in similar job classifications at work in the store.

SECTION 3. When returning from the leave, she must give the Personnel Office fifteen (15) days notice of her desire to return to work.

Article 15—Union Leave of Absence

SECTION 1. Any employee in the bargaining unit who is elected or appointed to a paid office in the Union, shall be granted a leave of absence, and upon the termination of said position in the Union shall be reinstated to his former position, plus such additional benefits that may be applicable in addition to his full seniority rights and privileges.

SECTION 2. The maximum period of absence permitted will be one (1) year subject to renewal and extension for ad-

ditional periods of only one (1) year, renewal periods may be extended only through the joint and mutual consent of both the Union and the Employer.

SECTION 3. The Union shall notify the Employer of any change in the employees status with the Union, and said employee must request reinstatement to his former position not later than fifteen (15) days after the Employer receives notification from the Union.

SECTION 4. The Employer agrees to permit no more than two (2) employees leave of absence without pay, in order to attend a Union coference or convention to which said employee may have been elected or appointed. The Union will notify the Employer the names of the delegates in advance in order that their jobs may be adequately covered during such leave of absence.

Article 16—Leave of Absence

SECTION 1. Any full-time employee with more than six (6) months of service desiring a leave of absence from the job because of illness or other legitimate reasons, must secure written permission from the Employer's Personnel Office, with a copy mailed to the Union.

SECTION 2. The length of absence is to be agreed upon by the Employer and the employee.

SECTION 3. Failure to return to work in accordance with the prearranged time

off shall result in the complete loss of seniority right to the employee so involved.

Article 17—Hours

SECTION 1. The maximum workweek for all employees covered by this Agreement, payable at straight time hourly rate shall not exceed:

Clerks:

45 hours to December 4, 1960
44 hours to December 3, 1961
42½ hours thereafter for duration of contract.

Department Managers:
and Front End Men:
49 hours to March 6, 1961
48 hours to December 3, 1961
47 hours thereafter for duration of contract

SECTION 2. The regular work day for male employees shall not exceed ten (10) hours; for females, nine (9) hours with the exception of Department Managers and Front End Managers noted in Article 43.

SECTION 3. All time worked in excess of the hours outlined above, shall be paid for at the rate of one and one-half (1½) times the employee's regular hourly rate.

SECTION 4. The five (5) day workweek does not have to be consecutive days.

SECTION 5. There shall be no pyramiding of overtime.

SECTION 6. There shall be no tolerance time. Employees will be paid for all time worked.

SECTION 7. The work week shall run Monday through Saturday inclusive.

SECTION 8. Any employees called in on Sundays and holidays shall be guaranteed five (5) hours work or pay in lieu thereof.

Article 18—Previous Benefits

No employee shall suffer a reduction in wages or an increase in hours or reduced vacation time or split shift by any provision of this Agreement or the signing thereof.

Article 19—Check-Off

SECTION 1. The Employer will deduct Union initiation fees and dues on the last Saturday of each month from the pay of employees who are members of the Union, and who individually and voluntarily certify in writing an authorization for such deductions in the amount certified by the Local Union to be due and owing. The Employer shall forward same to the Financial Secretary of the Local Union immediately following such deductions. The check-off authorization form to be used by the Union and recognized by the Company:

Check-Off Authorization Form

I, _____ hereby vol-
(Employee's Name)

untarily authorize _____
(Company's Name)

to deduct my initiation fee, and regular monthly dues as duly established from time to time by the Retail Clerks International Association, AFL-CIO, Local No. 1625, from my pay check on the first week of each month in advance, and deliver such initiation fee and dues to the aforementioned Local Union. This authorization shall continue to be in effect for the term of this contract between the Employer and the Unoin, or one year, from execution of check-off and shall automatically continue from year to year unless revoked in writing by the undersigned to the Employer, and the Union not more than fifteen (15) days nor less than ten (10) days prior to anniversary date of check-off authorization.

It is understood that the Employer's responsibility for the performance of this service is strictly limited to the delivery of such dues and initiation fees to the Retail Clerks Union, Local No. 1625.

Address

City

Telephone

Signed

Date

Store No.

Full-Time ( )

Part Time ( )

Section 2—Agency Shop Clause

"Employees shall have the right to voluntarily join or refrain from joining the Union. Employees who choose not to join the Union, however, and who are covered by the terms of this contract, shall be required to pay as a condition of employment, an initial service fee and monthly service fees to the Union for the purpose of aiding the Union in defraying costs in connection with its legal obligations and responsibilities as the exclusive bargaining agent of the employees in the appropriate bargaining unit. The aforesaid fees shall be payable on or before the first day of each month, and such sums shall in no case exceed the initiation fees and the membership dues paid by those who voluntarily choose to join the Union. Other than the payment of these service fees, those employees who do not choose to join the Union shall be under no further financial obligations or requirements of any kind to the Union." It shall also be a condition of employment that all employees covered by this Agreement shall on the 30th day following the beginning of such employment or the effective date of this agreement, whichever is later, pay established initial and monthly service fees as shown above.

Article 20—Health and Welfare

SECTION 1. The present Health and Welfare program consisting of Life Insurance, weekly Compensation Insurance and Family Hospital and Surgical Benefits shall

be incorporated into this Agreement and shall be continued for the duration thereof. As of September 1, 1960, the complete cost of the Health and Welfare Program shall be paid for by the Employer.

SECTION 2. All employees hired after the contract date and qualifying under ARTICLE 13, SECTION 2, shall three (3) months after date of employment qualify for the Health and Welfare Program.

SECTION 3. Employees injured on the job, and due to the injury cannot continue, shall receive full pay for said day. If a case is accepted as a compensation case, then the Employer will pay the weekly amount the employee receives under the Workmen's Compensation Law for the first week.

Article 21—Seniority

SECTION 1. Seniority shall appy to regular full-time employees working thirty (30) hours or more, and shall be determined by length of his latest continuous employment date without a break in service.

SECTION 2. In reduction of the work force seniority shall prevail, provided that employees retained shall be qualified or able to perform the work.

SECTION 3. In the case of recall after layoff, employees shall be recalled on the basis of seniority, provided they are qualified to perform the work for which there is a job opening.

SECTION 4. Seniority shall be considered lost:

(a) If an employee is laid off for a period exceeding three (3) months.

(b) If he fails to report for work for three (3) consecutive working days without notifying the Employer, unless it was impossible or unreasonable to do so.

(c) If he is duly discharged by the Employer.

(d) If he voluntarily quits.

(e) If he is recalled after layoff and fails to report for work within four (4) working days. Such call back and notification shall be by certified mail sent to the employee's last known address on file with the Employer. Copy of recall notice shall be mailed to the Union.

SECTION 5. New employees shall be employed on a trial basis for thirty (30) days. During the trial period, new employees may be discharged or laid off at the sole discretion of the Employer without recourse to the grievance procedure and without reference to seniority and without obligation to rehire such employee.

SECTION 6. The Employer shall prepare a seniority list showing names, classifications, rates and employment dates of all employees in the bargaining unit, the list to be made available to the Union at the signing of the Agreement, and the Em-

ployer shall furnish to the Union a weekly supplement list showing all deletions or additions to the seniority list.

Article 22—Sunday Work

SECTION 1. All Sunday work will be paid for at the rate of time and one-half (1½) the regular rate of pay, and there will be no reduction in the workweek of employees who perform Sunday work.

SECTION 2. There will be no discrimination against employees who refuse to work on Sundays and such Sunday work will be on a voluntary basis.

SECTION 3. It will be the policy of the Employer to distribute such Sunday work on an equitable basis consistent with the needs of management in the proper operation of the store.

Article 23—Work Schedules

SECTION 1. The hours of work for each employee shall be scheduled by the Employer.

SECTION 2. The Employer shall post a work schedule for all full-time employees not later than noon Saturday for the following week.

SECTION 3. A full-time employee scheduled to work on a particular day shall be guaranteed the scheduled hours for that day, provided he reports to work as scheduled.

SECTION 4. No employee shall be required to accept time off as compensation for overtime worked.

SECTION 5. Any employee called into work on his scheduled day off shall be paid at the rate of time and one-half (1½) except in cases of epidemics or storms.

Article 24—Guarantee Time

SECTION 1. Any employee except students reporting for work as requested at a time other than scheduled, shall be guaranteed four (4) hours work or four (4) hours pay in lieu thereof.

SECTION 2. School students, working AFTER school, shall be guaranteed two (2) hours work or two (2) hours pay in lieu thereof.

Article 25—No Split Shifts

No employee shall be required to work a split shift schedule.

Article 26—Rest Periods

The Employer agrees to grant all employees a fifteen (15) minute rest period for each four hours worked, not to exceed two (2) rest periods in any one day.

Article 27—Meal Periods

Each employee shall be allowed on his own time up to one (1) hour for lunch,

and one-half (½) hour or one (1) hour for supper, as scheduled by Employer.

Article 28—Transfers

SECTION 1. In the event of any temporary transfer of any employee from one store to another resulting in additional travelling fare over the regular fare paid by such employee, such employee shall continue to pay the regular fare and the Employer agrees to pay one additional fare up to a maximum of 50 cents per trip or $1.00 per round trip for any one day. All further addjtional fares to be paid for by the employee.

SECTION 2. No employee shall be required to take a transfer to a store outside the jurisdiction of the district manager's area. There shall be no unreasonable transfers.

Article 29—Tools

SECTION 1. All tools and equipment shall be furnished by the Employer.

Uniforms shall be furnished as provided by the Company heretofore.

Article 30—Union Store Card

SECTION 1. The Union agrees to furnish to the Employer at least one (1) union store card for each of the Employer's stores covered by this Agreement, to be displayed on such public portion of the premises as the Employer may select. Such

cards shall remain the property of and shall be surrendered to the Union upon demand.

Article 31—Voting Time

SECTION 1. During the General Elections (National and State) employees shall be granted reasonable time off, with pay, to vote, providing time off is necessary. Employees shall show proof of voting registration if required by Employer.

Article 32—Bulletin Boards

SECTION 1. The Employer will provide a bulletin board in each store. The Union may post notices necessary for conducting Union business with prior approval of the Employer.

Article 33—Jury Duty

SECTION 1. An employee who is called to jury duty shall receive the difference between jury duty pay and his base pay for those days on which he actually serves, providing he returns to his regular job on those days on which he does not serve.

Article 34—Funeral Leave With Pay

SECTION 1. In the case of the death of a parent, child, spouse, brother or sister, mother-in-law or father-in-law of a regular full-time employee requiring the absence of said employee from his regular scheduled assignment for the purpose of pre-

paring and/or attending the funeral, then such employee shall be granted a leave of absence of up to three (3) days.

SECTION 2. Where the employee's normal time off (vacation, holidays, designated day off, etc.) falls within the three (3) day period, he will not receive pay for three (3) days, but only for those days which are normally scheduled for work. Under no circumstances, however, shall the application of this clause result in a change in the employee's basic weekly salary.

Article 35—Separation Pay

SECTION 1. Any full-time employee separated from the Company for any reason other than proven dishonesty or quitting shall receive three (3) days notice or three (3) days pay in lieu thereof.

Article 36—Previous Experience

SECTION 1. New employees will be given credit for previous experience with other chains during the past five (5) years, when such experience is verified in writing. will be given this same consideration.

SECTION 2. Employees now working will be given this same consideration.

SECTION 3. Previous experience will be used only in determining the wage rate they will receive.

SECTION 4. Such previous experience shall be given only to those employees with

past experience with company's operating in the State of Florida that are covered wholly or partly under Retail Clerks Contract.

Article 37—Company Meetings

All employees required to attend Company called meetings shall be compensated at their straight time hourly rate.

Article 38—Strikes and Lockouts

SECTION 1. It is mutually agreed by the parties to this Agreement that there shall be no authorized strike or stoppage of work by the Union, nor shall there be any lockout by the Employer during the life of this Agreement, and that any difference or misunderstanding which may arise between the contracting parties shall be amicably adjusted by and between the parties themselves, and if any difference or misunderstanding cannot be amicably adjusted by and between the parties themselves then the matter shall be referred to a Board of Arbitration as provided for in ARTICLE 6 hereof.

SECTION 2. In the event of a threat of, preparation for, or the actuality of any unauthorized work stoppage, walkout or strike, the Union and all of its officials will take every reasonable action to prevent and to stop such proceedings by any of its members.

SECTION 3. In the event the Union should give official recognition to any picket line affecting the Employer, the Union will notify the Employer at least twenty-four (24) hours in advance of any participation by the Union.

Article 39—First Aid Kit

SECTION 1. The Employer shall install and keep supplied a first aid kit in each store, in such a place convenient and accessible to the employees in event of an accident or emergency which requires medical attention.

Article 40—Retroactivity

SECTION 1. Wage increases under this cnotract shall be retroactive to April 18, 1960.

Article 41—Merit Raises

No individual wage adjustment shall be made by the Employer except after consultation with, and consent of the Union, except as otherwise provided for in this Agreement.

Article 42—Military Leave

The law governing leave of absence for military service shall prevail, and failure to abide by such law shall also be considered as a violation of this Agreement.

Article 43

Wage and Hour Department Managers and Head Front End Men (Working 49 Hours)

Until March 6, 1961 ..... 49 hours—5 days
From March 6 of 1961 until December 3 of 1961 ..... 48 hourse—5 days
From December 3 of 1961 until expiration of contract ..... 47 hours—5 days

Work day for above named personnel shall consist of three (3) 9-hour days and two (2) 11-hour days, until March 6, 1961.

Thereafter, a new schedule will be agreed on at the time of each weekly hour change to conform with total weekly hours to be worked.

All Other Regular Full-Time Personnel

Until December 4, 1960 ..... 45 hours—5 days
From December 4 of 1960 until November 30 of 1961 ..... 44 hours—5 days
From December 3 of 1961 until expiration of contract ..... 42½ hours—5 days

Workday

Male	10 hours
Female	9 hours

Any time in excess of the above must be paid at the rate of time and one-half (1½) with exception of daily scheduled hours for Department Managers and Head Front Men as listed above.

Across The Board Increases

Male

DEPARTMENT MANAGERS AND HEAD FRONT END MEN (Working 49 hours per week):

$6.00 per week effective April 18, 1960
$5.00 per week effective April 17, 1961
$5.00 per week effective April 16, 1962

NOTE: The above increases are to be paid only those Male Department Managers and Head Front End Men who are on our Company's payrolls on July 11, 1960. Those Male Department Managers and Head Front End Men hired after July 11, 1960, do not receive the across-the-board increases as set forth as above.

ALL OTHER MALE EMPLOYEES:

For present full-time employees and Head Cashiers, Male and Female (working 45 hours per week):

$4.50 per week effective April 18, 1960
$3.50 per week effective April 17, 1961
$3.00 per week effective April 16, 1962

NOTE The preceding increases are to be paid only to those other male employees who are on the payroll as of July 11, 1960. Those male employees hired after July 11, 1960, do not receive the across-the-board increases set forth on page 18.

Across-The-Board Increases

Female

FOR PRESENT FULL TIME EMPLOYEES:

$4.00 per week effective April 18, 1960
$3.00 per week effective April 17, 1961
$3.00 per week effective April 16, 1962

NOTE: The above increases are to be paid only to those full-time female employees who are on the payroll as of July 11, 1960. Those full-time female employees hired after July 11, 1960, do not receive the across-the-board increases as set forth above.

Across-The-Board Increases

FOR PRESENT PART-TIME EMPLOYEES (working less than 30 hours per week): Male and Female (this does not include bag boys):

10¢ per hours effective April 18, 1960
10¢ per hour effective April 17, 1961
10¢ per hour effective April 16, 1962

NOTE: The above increases are to be paid only to those employees who are on the payroll as of July 11, 1960. Those part time employees hired after July 11, 1960, do not receive the across-the-board increases as set forth above.

BAG BOYS:

Across-the-Board increases for bag boys (full-time and part-time) in our employ July 11, 1960:

10¢ per hour effective April 18, 1960
10¢ per hour effective April 17, 1961
7½¢ per hour effective April 16, 1962

NOTE: The above increases are to be paid only to those full-time and part-time bag boys who are on our Company's payrolls on July 11, 1960. Those bag boys hired after July 11, 1960, do not receive the across-the-board increases as set forth above.

NOTE: Full-time and part-time bag boys are hired on an hourly basis not on a weekly basis.

NEW FULL-TIME PERSONNEL WAGE SCHEDULE. Effective from July 11, 1960 (this does not include bag boys): New hires do not receive the across-the-board increases as set forth in scheduled increases on pages 17 and 18.

Male

DEPARTMENT MANAGERS STARTING SALARY:

First 6 months of employment	$75.00 per week
Second 6 months of employment	$80.00 per week
Third 6 months of employment	$90.00 per week

NOTE: New hires do not receive the across-the-board increases as set forth in scheduled increases on pages 17 and 18.

ALL OTHER MALE EMPLOYEES:

First 6 months of employment	$50.00 per week
Second 6 months of employment	$55.00 per week
Third 6 months of employment	$58.00 per week
Thereafter for duration of contract	$60.00 per week

NOTE: New hires do not receive the across-the-board increases as set forth on pages 17 and 18.

PORTERS:

First 6 months of employment	$45.00 per week
Second 6 month of employment	$47.50 per week
Third 6 months of employment	$50.00 per week

NOTE: New hires do not receive the across-the-board increases as set forth on pages 17 and 18.

HEAD CASHIERS (Male or Female):

First 6 months of employment	$59.50 per week
Second 6 months of employment	$61.75 per week
Third 6 months of employment	$64.00 per week
Thereafter for duration of contract	$66.00 per week

NOTE: New hires do not receive the across-the-board increases as set forth on pages 17 and 18.

FEMALE CLERKS (Starting Salary):

First 6 months of employment	$45.00 per week
Second 6 months of employment	$47.50 per week
Third 6 months of employment	$50.00 per week
Thereafter for duration of contract	$53.50 per week

NOTE: New hires do not receive the across-the-board increases as set forth on pages 17 and 18.

PART-TIME MALE & FEMALE CLERKS

Part-time male and female clerks will be hired and paid on a pro-rata hourly basis:

MALE:	1960	$1.11 per hour
	1961	Pro-rated
	1962	Pro-rated
FEMALE:	1960	$1.00 per hour
	1961	Pro-rated
	1962	Pro-rated

In order for part-time clerks to receive their automatic increases referred to in schedule of increases, they must work the equivalent number of hours a full-time clerk works in six months.

For example:

First year contract— 26 x 45 hours	1,170 hours
Second year contract— 26x 44 hours	1,144 hours
Third year contract— 26 x 42½ hours	1,105 hours

WAGE SCALE FOR (FULL-TIME AND PART-TIME) BAG BOYS HIRED AFTER JULY 11th, 1960:

Starting Salary:

First 6 months of employment	70¢ per hour
Second 6 months of employment	80¢ per hour
Thereafter for duration of contract	85¢ per hour

NOTE: New bag boys who are hired after July 11, 1960 do not receive the across-the board increase as set forth on page 18.

Article 44—Cash Register Clause

Checkers, cashiers, handling cash, must have their own register till; no employee shall be responsible for shortgages in a cash drawer unless he or she has been given the privilege of counting his cash and has been given his register readings before and after the cash has been counted. Only one (1) employee shall be empowered to ring up on a cash drawer for which he or she is responsible.

Article 45—Expiration

This Agreement shall continue in effect from April 18, 1960 to April 15, 1963, and continue in effect from year to year thereafter unless either party notifies the other party sixty (60) days prior to expiration

date, or any anniversary date thereafter, of their desire to terminate or open the agreement for the purpose of amendments and/or changes.

In witness thereof the said parties execute this Agreement this 14th day of October, 1960.

FOR THE EMPLOYER:

J. S. SCHWARTZ
HAROLD FRIEDLAND
FRANK CATTERSON

FOR THE UNION:

PETER L. HALL
EMANUEL LOVENWORTH
FLORENCE WARNER
PEARL A. COUNTOIS
CHARLES W. BACHMAN
FRANK H. HARRISON
ROLAND G. CARROLL
LOUIS J. THOMAS
VERNON ADKINS
AL FAENZA
W. WILLIAM TRAVIS
FRED J. KHOURY
WM. M. KEMP
TOFICH HAKEEM

[fol. 15]

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT

IN AND FOR DADE COUNTY, FLORIDA

IN CHANCERY

No. 60C 11562

ALBERTA SCHERMERHORN, LOIS DEVITA, JOYCE E. THURO, and LARRY STARK, individually, as well as in a representative capacity on behalf of each and all other persons of a multitudinous class to which they belong and which is similarly situated, Plaintiffs,

vs.

LOCAL 1625 OF THE RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO; WILLIAM TRAVIS, President of Local 1625 of the Retail Clerks International Association, AFL-CIO; and FOOD FAIR STORES, INC., SOUTHERN DIVISION, a Pennsylvania Corporation, registered to do business in the State of Florida, Defendants.

JUDGMENT FOR DEFENDANTS—December 23, 1960

This cause came on to be heard after due notice to the parties upon the plaintiffs' prayer for temporary injunction contained in the Complaint herein and upon Response to Application for Temporary Injunction, Motion to Dismiss and verified Answer of the defendants Local 1625 of the Retail Clerks International Association, AFL-CIO and William Travis, president thereof, at which hearing were present the plaintiffs, their counsel, the defendant Travis, representatives of the other defendants and their counsel, and witnesses for the parties, at which time the Court heard preliminary statements from counsel for the various parties as to the contentions and positions of the parties,

at which time counsel for defendant Food Fair moved ore tenus to adopt the defensive motions filed by the other defendants, which motion was granted by the Court, and, after reserving ruling on the defensive motions, heard testimony of the plaintiffs and their witnesses and received documentary evidence on behalf of the plaintiffs and defendants and the depositions of the individual plaintiffs [fol. 16] taken on behalf of the defendants, and heard argument of counsel, and the Court being otherwise fully advised in the premises, upon consideration thereof;

It is Ordered, Adjudged and Decreed as follows:

1. That the prayer for temporary injunction contained in the Complaint be and is hereby denied.

2. That the Motions to Dismiss of the defendants be and are hereby granted and the Complaint in this cause be and is hereby dismissed for the reason that the Court finds that the agency shop clause, Section 2, Article 19 of the contract between the defendant Union and defendant Food Fair is not violative of the Florida "right to work law" as contained in Section 12 of the Declaration of Rights of the Constitution of Florida and Chapter 447, Florida Statutes.

3. That judgment in favor of the defendants herein be and is hereby granted and the plaintiffs shall go hence without day.

Done and Ordered in Chambers, at Miami, Dade County, Florida, this 23 day of December, 1960.

Pat Cannon, Circuit Judge.

[fol. 18]

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT

IN AND FOR DADE COUNTY, FLORIDA

IN CHANCERY

No. 60C 11562

[Title omitted]

CROSS ASSIGNMENTS OF ERROR

Come now the defendants, Local 1625 of the Retail Clerks International Association, AFL-CIO, and William Travis, President of Local 1625 of the Retail Clerks International Association, AFL-CIO, by and through their undersigned counsel, and specify and assign as Cross Assignments of Error upon which they will rely in the District Court of Appeal, Third Appellate District of Florida:

1. The court erred in the entry of its judgment for defendants, dated December 23, 1960 and recorded December 27, 1960 in Chancery Order Book 1489, page 244, in failing to dismiss the complaint filed in this cause on the ground of lack of jurisdiction of the subject matter of the cause, for the reason that the Labor-Management Relations Act of 1947, as amended, has pre-empted the field of labor relations.

2. The court erred in the entry of its judgment for defendants, dated December 23, 1960 and recorded December 27, 1960 in Chancery Order Book 1489, page 244, in failing to dismiss the complaint filed in this cause on the ground of lack of jurisdiction of the subject matter of the cause, for the reason that the exclusive jurisdiction to determine whether or not the agency shop contract referred to in the complaint violates Section 12 of the Declaration of Rights of the Florida Constitution or Stat-
[fol. 19] utes of Florida lies with the National Labor Relations Board, since such a violation would constitute a

violation of the Labor-Management Relations Act of 1947, as amended.

Dated this 18th day of January, 1961.

Claude Pepper Law Offices, Attorneys for Local 1625, R.C.I.A., AFL-CIO, and William Travis, 1701 Meridian Avenue, Miami Beach 39, Florida, By Allen Clements, Jr.

Of Counsel: S. G. Lippman, Kaplan, Ser & Abrams.

Certificate of Service (omitted in printing).

[fol. 20]

IN THE DISTRICT COURT OF APPEAL OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1961

THURSDAY, SEPTEMBER 14, 1961

Case No. 61-7

ALBERTA SCHERMERHORN, LOIS DEVITA, JOYCE E. THURO, and LARRY STARK, Appellants,

vs.

LOCAL 1625 OF THE RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO; WILLIAM TRAVIS, President of Local 1625 of the Retail Clerks International Association, AFL-CIO; and FOOD FAIR STORES, INC., SOUTHERN DIVISION, a Pennsylvania corporation, authorized to do business in Florida, Appellees.

ORDER WITHDRAWING OPINION AND JUDGMENT AND TRANSFERRING CASE TO THE SUPREME COURT OF FLORIDA—September 14, 1961

Following the filing on August 31, 1961, of our opinion and judgment but before issuance of our mandate, appellees

moved this court to withdraw its opinion and transfer the cause to the Supreme Court, asserting the appeal should have been made to the latter court because, they contend, the decision of the trial court was one "construing a controlling provision of the Florida constitution" (Art. V, § 4(2), Fla. Const., 26 F.S.A.) and therefore excluded from our jurisdiction as prescribed in Art. V, § 5(3), ibid.

On consideration of said motion and on authority of the recent Supreme Court decision in Robinson v. State, filed July 14, 1961, —— So. 2d ——, and in order that the question as to jurisdiction over this appeal may be determined by the court of paramount jurisdiction, we make this transfer of the cause to the Supreme Court under rule 2.1(5)(d), F.A.R.; and to effectuate this order our mandate is stayed, and if the Supreme Court takes jurisdiction of the appeal our opinion and judgment filed herein on August 31, 1961, shall stand vacated without further order, but if the Supreme Court concludes it does not have jurisdiction of the appeal then our said opinion and judgment will remain in force and our mandate will be directed to issue thereon.

Accordingly, and on the basis outlined hereinabove, it is ordered that the notice of appeal together with all papers filed prior to September 21, 1961, shall on that date be transferred to the Supreme Court of Florida as the proper court having jurisdiction in this cause.

A True Copy

Attest:

[Signature Illegible] Clerk, District Court of Appeal, Third Division.

[fol. 21]

Not Final Until Time Expires to File Rehearing Petition and, If Filed, Determined.

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1962

Case No. 31,465

ALBERTA SCHERMERHORN, LOIS DEVITA, JOYCE E. THURO, and LARRY STARK, Appellants,

vs.

LOCAL 1625 OF THE RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO; WILLIAM TRAVIS, President of Local 1625 of the Retail Clerks International Association, AFL-CIO; and FOOD FAIR STORES, INC., SOUTHERN DIVISION, a Pennsylvania corporation, authorized to do business in Florida, Appellees.

OPINION—Filed April 25, 1962

An Appeal from the Circuit Court for Dade County, Pat Cannon, Judge.

Bernard B. Weksler, for Appellants.

Claude Pepper Law Offices, S. G. Lippman (Washington, D. C.), Tim L. Bornstein (Washington, D. C.), and Kaplan, Ser & Abrams, for Local 1625 of the Retail Clerks International Association, AFL-CIO, et al. and Aronovitz, Aronovitz & Haverfield and Robert M. Haverfield for Food Fair Stores, Inc., Southern Division, Appellees.

Bolles & Prunty for John Hancock Mutual Life Insurance Company; Allen Clements, J. Albert Woll (Washington, D. C.) and Theodore J. St. Antoine (Washington, D. C.) for American Federation of Labor and Congress of Industrial Organizations and Florida State Federated Labor Council; John L. Kilcullen (Washington, D. C.) and T. David Burns, for Florida Right to Work Committee, Amicus Curiae.

HOBSON, J.

The appellants, plaintiffs in the action below, sought by an action in equity to enjoin the appellee labor union and Food Fair Stores from enforcing the provisions of an "Agency Shop" clause contained in a collective bargaining contract between the union and Food Fair. The contract provision under attack provides that employees who are not union members "shall be required to pay as a condition of employment, an initiation service fee and monthly service fees to the union," such amounts being equal to the initiation fees and monthly dues for union members. The appellants are non-union employees of Food Fair. It is [fol. 22] their contention that the agency shop provision of the contract violates the "right to work" provision of the Declaration of Rights of the Florida Constitution, Section 12.

A motion to dismiss the complaint was filed on the grounds, first, that the matter was one within the exclusive jurisdiction of the National Labor Relations Board by virtue of the provisions of 29 U.S.C.A. §§141-188, and also that the contract provision does not violate Section 12 of the Declaration of Rights.

The trial court granted the motion to dismiss and entered a final order wherein it was stated in part:

> "... the Complaint ... is hereby dismissed for the reason that the court finds that the agency shop clause, Section 2, Article 19 of the contract between the defendant Union and defendant Food Fair is not violative of the Florida 'right to work law' as contained in Section 12 of the Declaration of Rights of the Constitution of Florida ..."

The cause was appealed to the District Court of Appeal, Third District. The District Court heard arguments and filed an opinion in which the decree of the chancellor was reversed and the cause remanded. Before that decision became final the appellees filed a motion to the court to withdraw its opinion and transfer the appeal to this court, asserting that the appeal should have been made directly

to this court because the decision was one "construing a controlling provision of the Florida Constitution." Article V, Section 4, Florida Constitution. The District Court granted the motion and transferred the cause to this court, and entered an order withdrawing its opinion, conditioned upon this court's accepting jurisdiction. The initial question with which we are faced is whether we have jurisdiction to determine this cause on a direct appeal.

In our judgment, the chancellor's order quoted above clearly and unquestionably *construes* Section 12, Decla- [fol. 23] ration of Rights. Unlike in Milligan v. Wilson, Fla., 104 So. 2d 35, and Carmazi v. Board of County Commissioners, Fla., 104 So. 2d 727, the issues in the instant case *required* the trial court to rule directly on a constitutional provision. Moreover, the fact that there was such a direct ruling appears from the face of the lower court's order. The question is whether the *ruling* amounts to a *construction* of Section 12, Declaration of Rights. As stated in Armstrong v. City of Tampa, Fla., 106 So. 2d 407, and in Cohen v. State, Fla., 121 So. 2d 155, the trial court will be held to have construed a controlling provision of the constitution if the court undertakes to "eliminate existing doubts arising from the terms of the constitutional provision." In the instant case, there were "existing doubts," inasmuch as it has never before been determined by an appellate court in this State whether an agency shop clause contravenes the "right to work" amendment of our Constitution. The trial court undertook to eliminate these doubts by *squarely* holding that the contract clause was valid.

The Chancellor did not merely apply the facts "to a recognized clear-cut provision of the Constitution," as in Page v. State, Fla., 113 So. 2d 557, because the right to work clause is not "clear-cut" when considered in connection with the facts presented in the instant case. On the contrary, the trial court was confronted with, and decided, a legitimate constitutional question of first impression.

In Boyd v. Dade County, Fla., 123 So. 2d 323, we recognized that it was the plain constitutional plan of Article V, Section 4, "that judgments construing controlling provisions

of the Florida Constitution, *being of such great importance to all the people,* should be decided by direct appeals to the one court beyond which there can be no further appeal." (Emphasis supplied.) Certainly, the constitutional question decided in the instant case is of no *less* importance to the general public merely because the chancellor did not see fit to launch into an extended dissertation giving his [fol. 24] reasons for construing the constitutional provision as he did. Moreover, since the order *on its face* shows that the constitution was construed, this is not a case where it is necessary that we return the cause to the chancellor for a determination as to the basis of his ruling.

In the case of Boyd v. County of Dade, Fla., 123 So. 2d 323, we held that we had jurisdiction on direct appeal because the trial court had construed a controlling provision of the Florida Constitution in its order denying a motion for a jury trial in the Metropolitan Court of Dade County. The pertinent portion of the trial court's order was as follows:

> "'* * * after hearing argument of counsel and carefully considering each of the constitutional rights raised by the defendant for trial by jury and being otherwise fully advised in the premises, finds that the grounds given by the defendant in his request for a jury trial are not applicable to this Court. * * *.'"

Since, by virtue of the above quoted order, it was held that this court had jurisdiction on direct appeal, it is equally clear in the instant case that the trial court construed a controlling provision of the Florida Constitution within the meaning of Article V, Section 4, and that we therefore possess jurisdiction to determine this cause on direct appeal.

Upon full consideration of the arguments and briefs of the parties, as well as the briefs of the various amici curiae, we are of the opinion that the judgment of the trial court must be reversed for the reasons set forth herein and in the excellent and learned opinion prepared for the District Court of Appeal, Third District, by Judge Carroll, which is hereinafter set out *in haec verba.*

The portion of Section 12 of the Declaration of Rights which is in issue, reads as follows:

> [fol. 25] "The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union, or labor organization; provided, that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer."

This section clearly bestows on the workingman a right to join or not to join a labor union, as he sees fit, without jeopardizing his job. Inasmuch as the Constitution has granted this right, the agency shop clause is repugnant to the Constitution in that it requires the non-union employee to purchase from the labor union a right which the Constitution has given him. The Constitution grants a free choice in the matter of belonging to a labor union. The agency shop clause contained in the contract under consideration purports to acknowledge that right, but in fact, abrogates it by requiring the non-union worker to pay the union for the exercise of that right or, in the alternative, to be discharged from his employment. Such an arrangement is palpably and totally inconsistent with the freedom of choice contemplated by our Declaration of Rights, Section 12.

The appellees contend that, except for the "agency-shop" provision, the non-union employees of the appellant Food Fair would be "free riders," that is, they would reap the benefits of union representation without having to bear any of the cost thereof. This argument is grounded on the fact that the union is, by law, the bargaining agent for all employees—those who do not belong to the union as well as those who do. 29 U.S.C.A. §159. This argument may be answered by reference to the section of the Constitution under consideration. Clearly, it is the intent of this section to leave as a matter for *individual determination and preference* the question of whether the worker will [fol. 26] derive any benefit from association with a labor union. The choice is his to make. Presumably, the appel-

lants in the instant case have decided that union membership is not an overall benefit to them personally, else they would have joined.

The appellees further assert that our state courts are without jurisdiction to determine this matter, because of the pre-emption by the federal government of the field of labor relations, by virtue of the Labor Management Relations Act, 29 U.S.C.A. §§ 141-188. We hold, as did the Supreme Court of Kansas in the case of Higgins v. Cardinal Manufacturing Company, 188 Kan. 11, 360 P. 2d 456, that Section 14(b) of the Taft-Hartley Act [29 USCA §164(b)] preserves the jurisdiction of the states in matters involving state "right-to-work" provisions. It is true that Section 14 (b) specifically deals only with "agreements requiring *membership* in a labor organization as a consideration of employment . . ." However, it is not to be presumed that Congress would preserve to the states the field of right-to-work legislation, while, at the same time, intending that unions and management could, by the use of subterfuge of an agency shop clause, circumvent and, in effect, nullify a paramount provision of the organic law of any of the several states.

A recent decision of the Federal District Court of Nevada, as yet unreported, squarely supports our holding herein regarding the power of the states under Section 14(b) to prohibit the enforcement of agency shop agreements. In that case, the court held that although the literal language of Section 14(b) only reserves to the states the right to prohibit agreements making union *membership* compulsory, it would frustrate the congressional intent to construe that section so as to prevent the states from also prohibiting agency shop agreements. In its opinion, the District Court stated:

> [fol. 27] "Section 14(b) would be bereft of meaning if we were to construe it in a fashion which would render the states powerless to make illegal that type of union security agreement which imposes liabilities on the working man which, realistically, are the same liabilities, which under the section, the states may remove." Amalgamated Association of Street, Electric

Railway and Motor Coach Employees, Division 1225 v. Las Vegas-Tonopah-Reno Stage Line, Inc., U.S.D.C. Nev., January 12, 1962; 30 U.S. L. Week 2392.

Having thus expressed the opinion of this court on the question of its jurisdiction as well as the chief issues involved in this case, we hereby approve and adopt as our own the following unpublished opinion by the District Court of Appeal, Third District, prepared by Carroll, J.:

"The appellants, who were plaintiffs below, filed suit in equity for themselves and for all others similarly situated, against Food Fair Stores, Inc., Southern Division, a Pennsylvania corporation doing business in Florida, and the [fol. 28] appellee labor union and its president, to enjoin the application to plaintiffs and other non-union employees of an 'agency shop contract' between the employer and the union.[1] The contract provided that employees who were not members of the union 'shall be required to pay as a condition of employment, an initiation service fee and monthly service fees to the union,' being the amounts union members pay for initiation and for monthly dues.

"The complaint charged the contract violated the right to work provisions of the Florida Constitution[2] and statutes.[3] The trial court rejected that contention and rendered judgment for defendants, holding that the agency shop contract was not in violation of the Florida right to work law, and the plaintiffs appealed.

"[1] Through representing the majority, the union had gained the right under the law to act as bargaining agent for all of the employees. §8 (a) (5), National Labor Relations Act, 29 U.S.C.A. §158 (a) (5); §9 (a), 29 U.S.C.A. 159 (a)."

"[2] '* * * The right of persons to work shall not be denied or abridged on accoun. .f membership or non-membership in any labor union, or labor organization; provided, that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer. * * *' Fla. Const., Declaration of Rights, § 12, 25 F.S.A."

"[3] §§ 447.01 and 447.09, Fla. Stat., F.S.A."

"In a motion to dismiss in the trial court and again here the defendants-appellees contended that the controversy is one within the jurisdiction of the National Labor Relations [fol. 29] Board,[4] under § 8 of the Act (29 U.S.C.A. § 158), and that as a consequence we are required to yield jurisdiction to the Board.[5]

"This question as to jurisdiction has been decided contrary to that contention in three recent cases of this kind in appellate courts in Arizona, Indiana and Kansas.[6] We hold, as was held in those cases, that the Algoma case[7] of 1949 which sanctioned state regulation of union security agreements impinging on state right to work laws has not been overruled in that respect by the subsequent decisions of the United States Supreme Court dealing with this question of pre-emption. Not only has Algoma not been expressly overruled, but it has repeatedly been recognized and cited with apparent approval in later United States

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"[4] Essential to that contention was that the business involved be one engaged in interstate commerce. The record shows no allegation or reference to the subject matter being within the flow of interstate commerce. But we proceed on the assumption that it is, since the parties so treated it in argument. See Wood, Wire & Metal Lathers International Union v. Babcock Co., decided July 31, 1961, —— So. 2d ——."

"[5] This court has repeatedly recognized the doctrine of federal pre-emption and ceded jurisdiction to the Board in cases where it was shown to be required. See Amalgamated Clothing Workers, etc. v. Donald S. La Vigne, Inc., Fla.App.1958, 111 So.2d 462; International Ladies Garment W.U. v. Sherry Mfg. Co., Fla.App. 1959, 115 So.2d 27; International Hod Carriers, etc. v. Heftler Const. Co., Fla.App.1959, 116 So.2d 30; North Dade Plumbing, Inc. v. Bowen, Fla.App.1960, 116 So.2d 790; I.B. of E. W. Local 349 v. Shires, Fla.App.1960, 123 So.2d 259; Casteel v. United Brotherhood of Carpenters & Join., Fla.App.1960, 125 So.2d 123; Wood, Wire & Metal Lathers International Union v. Babcock Co., supra."

"[6] Sheet Metal Workers International Ass'n. v. Nichols, (1961), 89 Ariz. 187, 316 P.2d 204; Meade Electric Company v. Hagberg, (1959), 129 Ind.App.631, 159 N.E.2d 408; Higgins v. Cardinal Manufacturing Company, (1961), 188 Kan. 11, 360 P.2d 456."

"[7] Algoma P. & V. Co. v. Wisconsin Emp.Rel.Bd., 336 U.S. 301, 69 S.Ct. 584, 93 L.Ed. 691."

Supreme Court cases. See Colgate-Palmolive-Peet Co. v. N.L.R.B., 338 U.S. 355, 70 S.Ct. 166, 94 L.Ed. 161, 168; Garner v. Teamsters C. & H. Union, 346 U.S. 485, 74 S.Ct. [fol. 30] 161, 98 L.Ed. 228, 238; Weber v. Anheuser-Busch, 348 U.S. 468, 75 S.Ct. 480, 99 L. Ed. 546, 556; Guss v. Utah L.R.B., 353 U.S. 1, 77 S.Ct. 598, 1 L.Ed. 2d 601, 607; Local 24 of I.B. of T.C.W. v. Oliver, 358 U.S. 283, 79 S. Ct. 297, 3 L.Ed. 2d 312, 321; San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed. 2d 785, 788 (concurring opinion). As late as 1959, in the Oliver case, in footnote 10, it was said (358 U.S. at 296):

> 'In Algoma, state law was allowed to operate to restrict a provision of a collective bargaining contract only after it was found after an exhaustive examination of the legislative history of the Wagner Act that Congress intended to leave the special subject of the legality of maintenance of membership clauses up to the States through § 8(3) of that Act, 49 Stat. 452. Questions of the nature that we consider today were expressly left open. 336 US at 312.'

"This exception from the federal pre-emption doctrine seems an obvious one brought about by § 14(b) of the Federal Act,[8] which specifically authorizes and recognizes the validity of right to work laws of the several states. We agree with the statement of the Kansas Supreme Court on this point, where it was said:

> 'There would be little point in permitting the states to enact such [right to work] laws if they could not be enforced by the states.[9]'

"[8] 'Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.'. 29 U.S.C.A. § 164(b)."

"[9] In support of the argument for pre-emption appellees referred to a recent instance in which the National Labor Relations Board took jurisdiction of a matter which was claimed to have dealt with the question of an agency shop contract vis-a-vis a state right to

[fol. 31] "The chancellor was eminently correct in assuming jurisdiction and in not ceding it to the Board in this instance. But we hold that the chancellor was in error in ruling that this agency shop contract does not violate the Florida right to work law.

"Appellants contend the agency shop contract denies or abridges their right to work in violation of the Florida right to work law, by exacting tribute from them because of their non-membership in the union as a condition of their employment or continued employment.

"Appellees argue that because the union has gained the right to act as bargaining agent for all of the employees it is only fair that the non-member sector of the employees should have to pay money to the union as a condition of their right to work, to help the union defray the cost of such bargaining.

[fol. 32] "Regarding the intent and policy of this state's right to work law, the Supreme Court of Florida in Local Union No. 519 v. Robertson, Fla.1952, 44 So.2d 899, 902, said:

> 'By these provisions of the Constitution and the statutes the public policy of the State of Florida with respect to labor activities and labor opportunities has been set forth and defined. Under these provisions it

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work law. The ruling involved (130 N.L.R.B. No. 54), which concerned General Motors Corporation, was made in February of 1961, and is found in 4 C.C.H. Law Rep., N.L.R.B. decision §9663, p. 14,978. Examination of that ruling shows the question before the Board was not whether the *making and application* of an agency shop contract was violative of a state right to work law (which question, as recognized in the Algoma case is reserved to the state for determination), but the question before the Board was whether, in a state having a right to work law, refusal of an employer to bargain with a union with respect to inclusion of an agency shop clause in a bargaining contract was an unfair labor practice. Interestingly, the Board upheld the employer's refusal to bargain under those circumstances. Appellees strongly urged that such ruling of the Board constituted evidence and precedent for preempting jurisdiction of the matter involved here, but from the nature of the question which was before the Board, as we have pointed out, the action of the Board in that instance could not be given the effect which the appellees assigned to it."

is the declared public policy of the State that all working men, whether union or non-union, shall be considered on an equal footing with respect to labor opportunities. They are guaranteed complete freedom of decision in whether to join or refrain from joining any labor organization. *No person or organization may deny them the right of obtaining or retaining employment, nor may the right be abridged, by reason of membership or non-membership in any labor organization.* They are not to be coerced or intimidated in the enjoyment of their legal rights, including the right of free decision as to whether or not they will join a union, and any person or labor organization who so coerces or intimidates them is to be deemed guilty of a crime punishable by fine or imprisonment, or both.' [Italics supplied.]

"Under § 12 of the Declaration of Rights of Florida what is prohibited is the denial or *abridgement* of one's right to work 'on account of membership or non-membership in any labor union, or labor organization.' When, because of his non-membership, an employee is required to pay labor union dues, or sums equal to the dues, as a condition of employment or continued employment, his right to work is 'abridged.'

"Anything which imposes a charge or expense upon the free exercise of a right, abridges it in the sense of curtailing or lessening the use or enjoyment of that right. As defined in Webster's New International Dictionary, to abridge is 'to deprive; to cut off; to diminish, curtail.' [fol. 33] And 'abridge' is defined in The Oxford English Dictionary as being 'to curtail, to lessen, to diminish (rights, privileges, advantages, or authority.)' The Louisiana Supreme Court adopted this meaning and definition of *abridged* as contained in the right to work law of that state,[10] saying:

'The public policy of Louisiana is expressed in the Right to Work Act, Section 1, supra. In analyzing

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"[10] Piegts v. Amalgamated Meat Cutters, etc., 228 La. 131, 81 So.2d 835, 838."

"the right of a person or persons to work shall not be denied or *abridged* on account of membership or non-membership in any labor union or labor organization", we must look to the meaning of the word "abridged". A study of various law dictionaries and Webster's Dictionary will show that the Legislature intended the word "abridged", as used in the Act, to mean "diminished, reduced, curtailed, or shortened".'

"The natural and reasonable interpretation of the Florida constitutional amendment, which prohibits compulsory membership in a labor organization as a condition of employment or of continued employment, is that it necessarily forbids forcing a non-member employee to pay union initiation fees, dues and assessments or equivalent amounts as a condition of employment or of continued employment. A contrary construction of the right to work law would leave it little or no useful purpose to serve.[11]

"For the reasons stated, we are impelled to hold that the 'agency shop' provision in the contract here under attack [fol. 34] violates § 12 of the Declaration of Rights of Florida, which declares the right to work policy of this state. Accordingly, the decree is reversed and the cause remanded for further proceeding not inconsistent herewith.

"Reversed and remanded."

Regarding Footnote 9 of the foregoing opinion, it should be pointed out that the NLRB has since receded from its opinion in the General Motors Corporation case, 130 N.L.R.B. No. 54. See 133 N.L.R.B. No. 21. Likewise, it should be noted that on December 15, 1961, the Supreme Court of the United States denied a petition for certiorari in the case of Higgins v. Cardinal Manufacturing Company, supra, Footnote 6.

"[11] *Accord*, Sheet Metal Workers International Ass'n. v. Nichols, supra, 89 Ariz. 187, 316 P.2d 204; Higgins v. Cardinal Manufacturing Company, supra, 188 Kan. 11, 360 P.2d 456. *Contra*, Meade Electric Company v. Hagberg, supra, 129 Ind.App. 631, 159 N.E.2d 408."

For the reasons stated in our own opinion, and in the opinion adopted by us, the decree is reversed and the cause remanded for further proceedings not inconsistent herewith.

It is so ordered.

Roberts, C.J., Drew and Thornal, JJ., and Parks, Circuit Judge, concur.

Thomas, J., dissents because of lack of jurisdiction.

O'Connell, J., dissents as to jurisdiction, concurs as to merits.

O'CONNELL, J., Dissenting.

I must dissent because I am of the opinion that this court does not have jurisdiction to decide this case. However, I fully agree with the opinion on the merits of this cause.

[fol. 37]

MANDATE FROM SUPREME COURT OF FLORIDA

To the Honorable, the Judges of the Circuit Court for the Eleventh Judicial Circuit of Florida. Greeting:

Whereas, Lately in the Circuit Court of the Eleventh Judicial Circuit, in and for the County of Dade in a cause wherein

ALBERTA SCHERMERHORN, LOIS DEVITA, JOYCE E. THUBO, and LARY STARK, individually, as well as in a representative capacity on behalf of each a d all other persons of a multidudinous class to which they belong and which is similarly situaties, were

plaintiffs

(CIRCUIT COURT No. 60C 11562 — IN CHANCERY)

and

and

defendants

LOCAL 1625 OF THE RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO; WILLIAM TRAVIS, President of Local

1625 of the Retail Clerks International Association, AFL-CIO; and Food Fair Stores, Inc., Southern Division, a Pennsylvania corporation, registered to do business in the State of Florida, were

the Decree of said Circuit Court was rendered Dec. 23, 1960 as by the inspection of the transcript of the record of the said Circuit Court which was brought into the Supreme Court of the State of Florida, by virtue of an appeal agreeably to the laws of said State in such case made and provided, fully and at large appears:

And Whereas, at the January Term of said Supreme Court holden at Tallahassee, A. D. 1962, the said cause came on to be heard before the said Supreme Court on the said transcript of the record and was argued by counsel; in consideration whereof, on the 25th day April A. D. 1962 the said Supreme Court rendered its opinion and judgment in said cause as per copy thereof hereto attached and made a part hereof.

In Consideration Whereof, It Is Ordered by the Court that the Appellant do have and recover of and from the Appellees costs in this behalf expended herein taxed at Twenty-Five Dollars, and that all other costs shall be taxed in the court in which the appeal was entered, therefore,

You Are Hereby Commanded, That such further proceedings be had in said cause as according to right, justice, the judgment of said Supreme Court, and the laws of the State of Florida, ought to be had, the said Decree of the Circuit Court notwithstanding.

Witness, The Honorable B. K. Roberts

Chief Justice of said Supreme Court, and the seal of said Court at Tallahassee, this

14th day of May 1962

/s/ Guyte P. McCord
Clerk Supreme Court of Florida.

[fol. 38] Clerk's Certificate (omitted in printing).

[fol. 39]

SUPREME COURT OF THE UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 24, 1962.

Hugo L. Black, Associate Justice of the Supreme Court of the United States.

Dated this 19th day of July, 1962.

[fol. 40]

SUPREME COURT OF THE UNITED STATES

No. 368, October Term, 1962

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL 1625, AFL-CIO, ET AL., Petitioners,

vs.

ALBERTA SCHERMERHORN, ET AL.

ORDER ALLOWING CERTIORARI—November 19, 1962

The petition herein for a writ of certiorari to the Supreme Court of the State of Florida is granted. The case is transferred to the summary calendar and set for argument immediately following No. 404.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No.

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL 1625, AFL-CIO, and WILLIAM TRAVIS, President of Retail Clerks International Association, Local 1625, AFL-CIO, *Petitioners,*

v.

ALBERTA SCHERMERHORN, LOIS DEVITA, JOYCE E. THURO, and LARRY STARK, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioners pray that a writ of certiorari issue to review the decision of the Supreme Court of Florida entered in the above-entitled case on April 25, 1962.

OPINIONS BELOW

The decision and order of the Florida Circuit Court of Dade County (printed in the Appendix hereto, *infra*, pp. 20a-21a) is not reported officially but is unofficially reported in 47 LRRM 2300 (1960). The order of the

Florida Court of Appeal, Third District (printed in the Appendix hereto, *infra*, pp. 18a-19a), relinquishing its jurisdiction over the cause and transferring it directly to the Florida Supreme Court, is officially reported in 141 So. 2d 287 (1961) and, unofficially, in 48 LRRM 3119 (1961). The opinion of the Florida Supreme Court (printed in the Appendix hereto, *infra*, pp. 1a-14a) is officially reported in 141 So. 2d 269 (1962) and, unofficially, in 50 LRRM 2055 (1962). The mandate of the Florida Supreme Court has been stayed for a period of 120 days to permit the filing of this petition (Orders printed in the Appendix hereto, *infra*, pp. 14a-19a).

JURISDICTION

The judgment of the Supreme Court of Florida was entered on April 25, 1962, and has been stayed to enable petitioners to seek review in this Court. On July 19, 1962, an order extending the time for filing a petition for certiorari until August 24, 1962, was entered by Mr. Justice Black. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

Section 14(b) of the Taft-Hartley Act authorizes the states to prohibit labor contracts requiring "membership" in a labor union as a condition of employment. The question in this case is:

> Whether the Florida Supreme Court misconstrued § 14(b) of the Taft-Hartley Act in holding that it authorizes the states both to prohibit and to regulate an "agency shop" clause in an interstate labor contract, which clause does *not* require "membership" in a labor union but which does require non-member employees to pay a collective bargaining service fee to a labor union.

STATUTES INVOLVED

Section 14(b) of the National Labor Relations Act (61 Stat. 151, 29 U.S.C. § 164) provides as follows:

> Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

Section 12 of the Declaration of Rights of the Florida Constitution (§ 12, 25 Fla. Stat. Ann.) provides as follows:

> The right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union, or labor organization; provided, that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer.

STATEMENT

Petitioner Retail Clerks Local 1625 (hereinafter called "the union") is the recognized, exclusive bargaining agent for several thousand retail grocery clerks employed by Food Fair Stores, Inc., in five Southern Florida counties (R. 1, 14 p. 1). Food Fair is a large, interstate retail food chain (R. 28, 68).[1]

In negotiations for their current labor agreement, which is effective until April 15, 1963, the employer

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[1] The National Labor Relations Board has regularly asserted jurisdiction over this employer. Florida Wholesale Grocery Co. d/b/a Food Fair Stores, 83 NLRB 852 (1949); Food Fair Stores, Inc., 120 NLRB 497 (1958); Food Fair Stores, Inc., 138 NLRB No. 2, 50 LRRM 1512 (1962); NLRB v. Food Fair Stores, Inc., ... F. 2d ...., 50 LRRM 2913 (3d Cir. 1962).

and the union agreed upon a provision commonly known as an "agency shop" clause. This clause, whose validity has been challenged by the litigation at bar, provides as follows (R. 3, 8, 14):

> "'Employees shall have the right to voluntarily join or refrain from joining the Union. Employees who choose not to join the Union, however, and who are covered by the terms of this contract, shall be required to pay as a condition of employment, an initial service fee and monthly service fees to the Union for the purpose of aiding the Union in defraying costs in connection with its legal obligations and responsibilities as the exclusive bargaining agent of the employees in the appropriate bargaining unit. The aforesaid fees shall be payable on or before the first day of each month, and such sums shall in no case exceed the initiation fees and the membership dues paid by those who voluntarily choose to join the Union. Other than the payment of these service fees, those employees who do not choose to join the Union shall be under no further financial obligations or requirements of any kind to the Union.' It shall also be a condition of employment that all employees covered by this Agreement shall on the 30th day following the beginning of such employment or the effective date of this agreement, whichever is later, pay established initial and monthly service fees as shown above."

In November of 1960, four bargaining unit employees instituted an action for damages and an injunction against the employer, the union, and the union's president in the Florida Circuit Court for Dade County (R. 1). The gravamen of their complaint was that the "agency shop" clause violated Article 12 of the Declaration of Rights of the Florida Constitu-

tion, popularly known as a "right-to-work" law (Decl. of Rts., Fla. Constn., § 12, 25 Fla. Stat. Ann.) (R. 3-4).

Moving to dismiss the complaint and opposing plaintiffs' application for a temporary injunction, defendants pleaded that the "agency shop" clause does not violate Florida law, because it does not require "membership" in the union, and that the state courts have no jurisdiction to regulate this method of financing a union's collective bargaining functions in interstate commerce, because the subject matter is preempted by federal law and is subject to the exclusive administration of the National Labor Relations Board (R. 9, 11).

On plaintiffs' motion for a temporary injunction and defendants' cross-motion to dismiss, a full trial was held before the trial court who heard the testimony of various witnesses and who received documents and depositions into evidence (R. 15-16). Based on the pleadings and the evidence, the trial court held that this "agency shop" clause did not violate the Florida Constitution. Judgment for defendants was granted dismissing the complaint (R. 15-16).

Plaintiffs appealed to Florida's Third District Court of Appeal contending that the trial court's decision was erroneous as a matter of Florida law. To preserve the federal questions, defendants cross-appealed reiterating their defense in this court that the federal labor statutes have occupied the field and that the state courts have no power to proscribe this method of financing collective bargaining functions in interstate commerce (R. 18). After hearing argument and rendering a decision reversing the trial court, but before its decision became final, the District Court of Appeal vacated its decision and transferred the entire proceed-

ing to the Florida Supreme Court because an intervening decision of the Florida Supreme Court had held that District Courts of Appeal have no jurisdiction to review cases involving a "controlling" construction of the state constitution (R. 20). The entire proceeding was then transferred to the Florida Supreme Court for decision on a "direct appeal" (R. 20, 24).

With two justices dissenting on jurisdictional grounds,[2] the Florida Supreme Court held that this "agency shop" clause violated the state's "right-to-work" policy. It reversed the trial court (R. 24), adopted *in haec verba* the vacated decision of the District Court of Appeals (R. 24), and it expressly rejected defendants' contention that federal law deprives the state courts of jurisdiction to enjoin the enforcement of this contract (R. 26, 28-29).

The substance of the Florida Supreme Court's disposition of the issue of federal preemption of state court jurisdiction over the subject matter is contained in the following paragraph from its opinion (R. 26):

> "The appellees further assert that our state courts are without jurisdiction to determine this matter, because of the pre-emption by the federal government of the field of labor relations, by virtue of the Labor Management Relations Act, 29 U.S.C.A. §§ 141-188. We hold, as did the Supreme Court of Kansas in the case of Higgins v. Cardinal

[2] The dissenting justices did not state their reasons for dissenting (R. 34). They may have dissented either because they disagreed with the majority's acceptance of this case as a "direct appeal" from the trial court or because they agreed with petitioners herein that the state courts have no jurisdiction to regulate the subject matter.

Manufacturing Company, 188 Kan. 11, 360 P. 2d 456, that Section 14(b) of the Taft-Hartley Act [29 USCA §.164(b)] preserves the jurisdiction of the states in matters involving state "right-to-work" provisions. It is true that Section 14(b) specifically deals only with 'agreements requiring *membership* in a labor organization as a consideration of employment . . .' However, it is not to be presumed that Congress would preserve to the states the field of right-to-work legislation, while, at the same time, intending that unions and management could, by the use of subterfuge of an agency shop clause, circumvent and, in effect, nullify a paramount provision of the organic law of any of the several states."

This petition followed.[3]

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[3] As a consequence of a procedural-clerical error in the Circuit Court, arising from the transfer of the case to the Florida Supreme Court as a direct appeal, the testimony of witnesses, depositions and several exhibits introduced in the trial court (R. 15-16) never reached the Florida Supreme Court. However, petitioners' brief to the Florida Supreme Court, a part of the record here, sets forth the uncontradicted facts adduced before the trial court (R. 68-70). This evidence was intended merely to show the panoply of benefits which all employees in this bargaining unit have received as a result of the union's services on their behalf. While this evidence demonstrated the equity and fairness of the "agency shop" under the circumstances, it was unnecessary to the Florida Supreme Court's passing on the issue of state court jurisdiction, and it is equally unnecessary to this Court's jurisdiction to review the federal questions herein.

In the absence of the full factual record, the parties' contract, which was before the Florida Supreme Court, adequately sets forth the entire range of benefits negotiated by the union, including wages, vacations, holidays, leaves of absence, insurance protection, grievance machinery, seniority rights and many other valuable, collectively bargained rights and benefits (R. 14).

REASONS FOR GRANTING THE WRIT

I. THE CONSTITUTIONAL AND JURISDICTIONAL ISSUES HEREIN ARE OF GREAT AND IMMEDIATE IMPORTANCE TO WORKERS IN NINETEEN "RIGHT-TO-WORK" STATES

Whether § 14(b) of the Taft-Hartley Act authorizes the states to prohibit "agency shop" agreements in interstate commerce is a labor relations issue of burning intensity in nineteen "right-to-work" states.[4]. A definitive resolution of this issue will affect the working conditions of millions of workers. The importance of the question is second to none in the practical world of labor relations as more and more major industries, such as the basic steel and missile industries, adopt such agreements.[5]

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[4] The nineteen "right-to-work" laws are as follows: Ala. Code Ann. Tit. 26 § 375 (1958); Ark. Stat. Ann. §§ 81-201 to 205 (1960); Ariz. Rev. Stat. Ann. §§ 23-1301 to 1307 (1956); Fla. Stat. Ann. Const., Decl. of Rts. § 12 (Supp. 1960); Ga. Code Ann. §§ 54-901 to 905 (1961); Ind. Stat. Ann. §§ 40-2701 to 2706 (Supp. 1961); Iowa Code Ann. §§ 736 A.1 to .8 (1950); Kan. Const. Art. 15, § 12 (1958); Miss. Code Ann. § 6984.5 (Supp. 1958); Neb. Const. Ar. XV, §§ 13-15, Neb. Stat. Ann. §§ 48-217 to 219 (1952); Nev. Rev. Stat. §§ 613.230 to 300 (1957); N.C. Gen. Stat. Ann. §§ 95-78 to 84 (1958); N.D. Cent. Code §§ 34-01-13 (1960); S.C. Code Ann. §§ 40-46 to 46.11 (Supp. 1960); S.D. Code §§ 17.1101, 17.9914 (Supp. 1962); Tenn. Code Ann. §§ 50-208 to 212 (1955); Tex. Rev. Cir. Stat. Art. 5154g (Supp. 1960); Utah Code Ann. §§ 34-16-1 to 16-18 (Supp. 1961); Va. Code Ann. §§ 40-68 to 74.5 (Supp. 1960).

[5] As recently as July 17, 1962, a major strike in the missile industry was averted when Douglas Aircraft agreed to an "agency shop" provision in its contracts with the Automobile Workers and the International Association of Machinists. The application of these agreements to the state of North Carolina, however, has been deferred by the parties because of the legal uncertainties of the "agency shop" in that "right-to-work" state. Wall Street Journal, July 17, 1962, p. 2, col. 3.

The nation-wide strike in the basic steel industry in 1959 similarly was settled with agreement upon an "agency shop" clause in "right-to-work" states, subject to a prior legal determination of its validity. Memorandum of Agreement in Basic Steel Industry, 45 LRRM 12, 15 (1960).

A recent survey of some 400 representative collective bargaining agreements found that six percent of them contain "agency shop" provisions, a marked increase over prior surveys. Basic Patterns in Union Contracts, 46 LRRM 14, 18 (1960).

The urgency and importance of the problem is demonstrated by the growing body of reported cases in the state courts involving the scope and application of Section 14(b). See, e.g. *Arizona Flame Restaurant* v. *Baldwin*, 34 LRRM 2707 (Ariz. Sup. Ct. 1954) affirmed as modified, *Baldwin* v. *Arizona Flame Restaurant*, 82 Ariz. 385, 313 P. 2d 759 (1954); *Schermerhorn* v. *Local 1625, Retail Clerks International Association*, 141 So. 2d 269 (1962); *Meade Electric Co.* v. *Hagberg*, 129 Ind. App. 631, 159 N.E. 2d 408 (1959); *Higgins* v. *Cardinal Mfg. Co.*, 188 Kan. 11, 360 P. 2d 456 (1961), *certiorari* denied *sub nom General Drivers* v. *Higgins*, 368 U.S. 829 (1961); *Motor Coach Employees* v. *Stage Line, Inc.*, F. Supp. , 49 LRRM 2732 (D. Nev. 1961).

In the *Meade* case, *supra*, the court, proceeding on the assumption that agency shop was permissible under the federal labor law, held that the Indiana statute did not proscribe the agency shop but forbade only those contracts requiring membership in a union. Therefore, the court held that the Indiana statute did not raise a question of federal preemption. The court noted, however, that had the Indiana statute attempted to outlaw the agency shop, a serious federal question would have been raised. In *Higgins* and *Schermerhorn*, *supra*, the state courts held that the agency shop was subject to regulation by the states under § 14(b). This court denied *certiorari* in *Higgins*. However,

since the state court decision in *Higgins*, the Court of Appeals for the Sixth Circuit decided *General Motors Corp.* v. *N.L.R.B.*, F. 2d , 50 LRRM 2396 (1962), holding that an agency shop agreement is unlawful as a matter of federal law. The decision of the Sixth Circuit raises a decisive preemption issue which was not before the court when it denied *certiorari* in *Higgins*. This case is discussed in greater detail in Point IV, *infra*. Furthermore, in the absence of a definitive statement by this Court with respect to § 14(b), the states are beginning to view state "right-to-work" laws enacted under § 14(b) as a broad license under which the states may impose anti-union restrictions on the legitimate activities of labor unions, even going to the extent of outlawing union operated non-discriminatory hiring halls. See, *Kaiser* v. *Price-Fewell, Inc.*, ... Ark. ...., 50 LRRM 2531 (1962). Also see *Branham* v. *Miller Elec. Co.*, 118 S.E. 2d 167, 47 LRRM 2506 (S.C. Sup. Ct. 1961). For these reasons, and in view of the serious problem of mootness in the *Higgins* case and the greatly increased importance of the question since the denial of *certiorari* in *Higgins*, petitioner submits that the Court's refusal to grant *certiorari* in *Higgins* should not preclude consideration of the instant petition on its merits. *Darr* v. *Burford*, 339 U.S. 200, 226-228 (1949).

The importance of the issue is further underlined by a large body of recent literature on the subject,[6] as

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[6] Several authors, in agreement with petitioners herein, have concluded that the states have no constitutional authority or jurisdiction to proscribe "agency shop" contracts in interstate commerce pursuant to § 14(b). Jones, The Agency Shop, 10 Lab.

well as a complete manual on the "agency shop" for use by Commissioners of the Federal Mediation Service.[7]

While the number of employees presently covered by "agency shop" contracts is higher than ever before, the "agency shop" has been a well-known contract arrangement in the United States for many years, well before the enactment of § 14(b) in 1947.[8] The War Labor Board directed parties to incorporate such features in their agreements in the early 1940's as a compromise method of financing collective bargaining functions beneficial to all employees without imposing the legal and moral commitments of the union membership on a dissenting minority. E.g., *Alexander Primas Co.*, 21 War Lab. Rep. 219, 221 (1945).

Believing that compulsory union "membership" is an infringement on the personal liberty of workers

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L. J. 781 (1959); The Agency Shop, 14 U. Fla. L. Rev. 281, 284; The Agency Shop and State Right-to-Work Laws, 35 Notre Dame Law. 547 (1960).

Other articles which discuss the issue at bar and its importance are: McConkey, Was the Agency Shop Prematurely Scrapped?, 9 Lab. L. J. 150 (1958); Rose, The Agency Shop v. the Right-to-Work Law, 9 Lab. L. J. 579 (1958); The Agency Shop, Federal Law, and the Right-to-Work States, 71 Yale L. J. 330 (1961); The NLRB and Agency Shops in Right-to-Work States, 14 Stan. L. Rev. 182 (1962); Right-to-Work Amendment Construed—Agency Shop Prohibited, 1 Washburn L. J. 209 (1961).

[7] Federal Mediation Service, The Agency Shop (1959).

[8] Millis and Montgomery, Organized Labor 484 (1945). The authors of this famous treatise point to the execution of an "agency shop" agreement with a major tobacco manufacturer in 1942. Describing the purpose of such a contract, they observe, at p. 484:

> "This type of arrangement spreads union costs equally over those who benefit from the collective-bargaining agreement but leaves individuals free to participate in the union, or not, or to form other unions."

but recognizing that workers who enjoy the fruits of collective bargaining should in justice be required to bear their share of the costs, many Western nations have adopted the "agency shop" or variations of it in their labor relations laws and practices.[9]

This Court has not heretofore provided any guidance as to the meaning of § 14(b) on this issue. Thus,

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[9] In 1949, the Swiss Federal Court upheld the legality of an "agency shop" arrangement known in Swiss law as "loyalty to the contract" combined with a "solidarity levy." *Muller and the Swiss Federation of Autonomous Trade Unions* v. *Zurich Garage Owners' Associations and Swiss Federation of Metal and Watch Workers (Zurich Branch)*, A.T.F. 72 II 305 (1949), quoted in Berenstetin, Union Security and the Scope of Collective Bargaining Agreements in Switzerland, February, 1962, International Labour Review 101, 113: The Swiss Federal Court ruled:

> "... it would not be fair to allow an outsider, without making any financial sacrifice, to benefit by the many advantages afforded by a collective agreement, in negotiating and implementing which the contracting organizations have incurred considerable expenditure that has been met out of their members' contributions."

In Denmark, where labor organizations administer the national unemployment insurance program, non-union workers pay a one-third, added premium to the labor organization in their industry to defray its costs in administering the program. Jensen, Trade Union Dues in Denmark, No. 143 Free Labor World 171 (1962).

Canada, which often is given credit for having originated the "agency shop," has adopted it rather widely. Shister, Aaron and Summers, Eds., Public Policy and Collective Bargaining 101-102 (1962). Dudra, Union Security in Canada, 12 Lab. L. J. 585, 592-593 (1961).

A recent article suggests the emergence of an "agency shop" system of labor union financing in the Caribbean area as a method which "allows a worker to remain a non-unionist, while he pays the weekly union subscription like everyone else." Dyce, The Check-Off System in the Caribbean, No. 142 Free Labor World 130, 131 (1962).

the Florida Supreme Court has relied extensively on the decisions of other state courts as the basis for interpreting the federal statute, and doubtless still other state courts will rely upon the decision of the Florida court. If the Florida court has grossly misinterpreted the federal law, as we believe it has, a definitive interpretation of § 14(b) by this Court may help to avoid the unnecessary institution of litigation on this issue in the other "right-to-work" states.

II. THE DECISION BELOW IS IN IRRECONCILABLE CONFLICT WITH THE FEDERAL STATUTE. FOR CONGRESS USED THE TERM "MEMBERSHIP" IN ITS ORDINARY MEANING

When Congress enacted the Taft-Hartley Amendments to the Labor Act in 1947, it was concerned with discriminatory practices of some unions under "closed shop" agreements. It thus enacted §§ 8(a)(3) and 8(b)(2) to proscribe the "closed shop" in interstate commerce and to limit the power of unions and employers to discipline employees under "union shop" provisions. See *Radio Officers Union* v. *NLRB*, 347 U.S. 17 (1954).

Section 14(b), added to the Act at the same time, authorizes the states to proscribe agreements "*requiring membership* in a labor organization as a condition of employment" (emphasis added). There is not a scintilla of evidence in the legislative history of § 14(b) to support the view that by "membership in a labor organization" Congress intended to authorize the states to proscribe anything other than "membership" in its common and universally understood sense. Senator Taft himself discussed the "agency shop" on the floor of the Senate, and both Congressional labor committees indicated their awareness of "agency shop" ar-

rangements,[10] recognizing that the "agency shop" is an arrangement which does not require "membership" in a labor union. Congress' awareness of the "agency shop" would have compelled it to deal with the "agency shop" in unambiguous terms, if it had intended to authorize the states to proscribe it under § 14(b).

Although the Taft-Hartley Act does not define the phrase "membership," Congress' most recent legislation on this subject contains a very explicit definition of the phrase "member." Section 3(o) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 402(o):

> " 'Member' or 'member in good standing', when used in reference to a labor organization, includes any person who has fulfilled the requirements for membership in such organization, and who neither has voluntarily withdrawn from membership nor has been expelled or suspended from membership after appropriate proceedings consistent with lawful provisions of the constitution and bylaws of such organization."

So defined, the difference between membership in a labor organization and the payment of a service fee to a labor organization is profound. It is the difference between citizenship in, as contrasted with the payment of taxes to, a state.

If Congress' intention in employing the phrase "membership in a labor organization" had been to

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[10] Senator Taft discussed the "agency shop" in the light of the famous arbitration award by Justice Rand of the Supreme Court of Canada in *Ford Motor Co.*, 1 Lab. Arb. Repts. 439 (1946). 2 Legis. Hist. of LMRA 1422. See also Hearings on Bills to Amend the NLRA, House Labor Committee, 80th Cong., 1st Sess., pp. 1158-1166; Hearings on S. 55, Senate Labor Committee, 80th Cong., 1st Sess., pp. 66-67, 806.

encompass the "agency shop," it would have used the phraseology of the "right-to-work" statutes in ten states which expressly prohibit the payment of any fees to a labor organization as a condition of employment.[11] The Mississippi statute, for example, expressly provides that (Miss. Code Ann. § 6984.5, Sec. 1(e), Supp. 1958):

> "No employer shall require any person, as a condition of employment or continuation of employment, to pay any dues, fees or other charges of any kind to any labor union or other labor organization."

These ten states have recognized that the term "membership" is not broad enough to encompass the contractual requirement of service fee payments to a labor union. They believed it necessary to say more in order to proscribe the "agency shop." Congress, not intending to authorize the prohibition of the "agency shop" under § 14(b), did not express its intention in this fashion.

By ruling that the phrase "membership" in § 14(b) means non-membership as well as "membership," the Florida Supreme Court has interpreted the federal Act contrary to this Court's precept that it was "the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation," requiring Congress' words to be interpreted in their common, ordinary meaning. *Local 1976, United Brotherhood of Carpenters* v. *NLRB*, 357 U.S. 93, 99-100 (1958). This precept is well-suited to the construction of § 14(b)

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[11] Alabama, Arkansas, Georgia, Iowa, Mississippi, North Carolina, South Carolina, Tennessee, Utah and Virginia. See footnote 4, *supra*.

which authorizes the states to create a narrow exception to the otherwise uniform federal law.

III. REGULATION OF THIS "AGENCY SHOP" CONTRACT BY THE FLORIDA COURTS IS FUNDAMENTALLY INCONSISTENT WITH THE DOCTRINE OF FEDERAL PREEMPTION, FOR THE ADMINISTRATION OF THIS CONTRACT IS EITHER A PROTECTED OR A PROHIBITED ACTIVITY AS A MATTER OF FEDERAL LAW

By regulating and prohibiting this voluntary agreement between petitioner and an interstate employer, the Florida Supreme Court has improperly entered a field of regulation entrusted exclusively to the National Labor Relations Board. Many decisions of this Court have made it ineluctably clear that such concurrent state regulation must fall.

Beginning with *Garner* v. *Teamsters*, 346 U.S. 485 (1953), a series of cases culminating most recently in *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236 (1959), and *Marine Engineers Beneficial Association* v. *Interlake Steamship Co.*, — U.S. —, 82 S. Ct. 1237, 8 L. Ed. 418 (1962) has expressed the doctrine of federal preemption of interstate labor relations: when an activity in commerce is "arguably" protected or prohibited by the federal Labor Act, "state court jurisdiction must yield," for "to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes." *Garmon, supra*, 359 U.S. at 244.

The "agency shop" arrangement is one which the National Labor Relations Board has for many years held to be lawful in interstate commerce. *Public Service Co. of Colorado*, 89 NLRB 418 (1950); *American Seating Co.*, 98 NLRB 800 (1952); *General Motors Corp.*, 130 NLRB No. 54 (1961), reconsidered and overruled in 133 NLRB No. 21 (1961), set aside and

enforcement denied *sub. nom General Motors Corp.* v. *NLRB,* F. 2d , 50 LRRM 2396 (6th Cir. 1962).

The *General Motors* case is discussed at pp. 18-19 *infra.* It is at least arguable that the execution of this contract in interstate commerce is a "protected" activity as a matter of federal law, *a fortiori* if § 14(b) does not authorize the states to prohibit such an agreement.

Even if this Court were to interpret § 14(b) as authorizing the states *to declare* unlawful "agency shop" agreements in commerce, the state courts have no jurisdiction *to regulate* such agreements. This is true because the execution of such a contract, *declared* unlawful by state law, arguably constitutes an unfair labor practice proscribed by federal law, subject to the exclusive regulation of the Labor Board: Section 14 (b) does not confer jurisdiction on the state courts to regulate and remedy contracts which are unlawful as a matter of state law; it merely authorizes the states to declare, as a matter of federal law, that agreements requiring "membership" are unlawful. *Bldg. Construction Trades Council* v. *American Builders,* 139 Colo. 236, 337 P. 2d 953 (1959). Cf. *United States* v. *Sharpnack,* 355 U.S. 286 (1958).

Section 8(a)(3) of the Labor Act, 29 U.S.C. § 158 (a)(3), however, makes it unlawful for an employer to enter into an agreement which violates employees' rights to refrain from union activities under § 7 of the Act, 29 U.S.C. § 157. When § 7 is read in conjunction with § 14(b) of the Act, it seems quite clear that Congress made it unlawful for an employer and a labor organization to require "membership" in a labor organization, if such requirement is declared unlawful by state law. Such an agreement arguably would be unlawful and subject to unfair labor sanctions under

§ 8(a)(3) of the Act. Therefore, even if an "agency shop" agreement may be prohibited by state law, it does not follow that the states have jurisdiction to regulate and remedy such an agreement in conflict with the jurisdiction of the Labor Board to regulate agreements which violate § 7 of the Act. The Supreme Court of Colorado has so reasoned. *Bldg. Construction Trades Council* v. *American Builders, supra.* The Colorado high court properly points out that "Section 14(b) only applies where such an agreement could not be executed or applied under any circumstances within the state," and "in the first instance, the Board would have jurisdiction to apply said section in a proper case, or cede to a state agency authority to try the matter." 337 P. 2d at 960.

That state court regulation of an "agency shop" agreement in commerce is inconsistent with the otherwise uniform federal law is illustrated by the divergent state remedies applied to violators of "right-to-work" laws. Executing an unlawful contract is remediable under § 10 of the federal Act by an NLRB cease and desist order following an administrative hearing. Execution of an "agency shop" agreement in South Carolina, on the other hand, subjects the negotiators to imprisonment for 30 days, a fine of $1,000, actual and punitive damages in a civil suit, and a civil injunction. (S.C. Code Ann. §§ 443.8 and 443.9 (Supp. 1960).) There could be no clearer conflict between state and federal remedies, demonstrating the necessity for the application of the doctrine of federal preemption to the instant case. Cf. *Garner* v. *Teamsters*, 346 U.S. 485 (1953).

Where states have heretofore sought to regulate protected or proscribed conduct under their "right-to-

work" laws, this Court has unhesitatingly reversed *per curiam*. *Teamsters Union* v. *Kerrigan Iron Works*, 353 U.S. 969 (1957); *Local 429, International Brotherhood of Electrical Workers* v. *Farnsworth & Chambers Co.*, 353 U.S. 969 (1957); *DeVries* v. *Baumgartner's Elec. Construction Co.*, 359 U.S. 498 (1959). Accord, *Douglas Aircraft Co.* v. *Local 379, International Brotherhood of Electrical Workers*, 101 S.E. 2d 800 (N.C. 1959).

This instant case, no less than the cases just cited, requires the application of the doctrine of federal preemption to preserve the exclusive jurisdiction of the Labor Board to administer federal law. And here, as in the cases just cited, state "right-to-work" statutes cannot justify the application of diverse principles and remedies to conduct in interstate commerce.

IV. A RECENT DECISION OF THE SIXTH CIRCUIT EMPHASIZES THE IMPORTANCE OF THE INSTANT CASE AND RAISES THE PROBLEM OF CONCURRENT STATE AND FEDERAL REGULATION OF "AGENCY SHOP" AGREEMENTS

The U. S. Court of Appeals for the Sixth Circuit has recently held that § 8(a)(3) of the Labor Act prohibits the execution of "agency shop" agreements in interstate commerce in all fifty states. *General Motors Corp.* v. *NLRB*, — F. 2d —, 50 LRRM 2396 (6th Cir. 1962) (not reported). In the opinion of the Sixth Circuit, § 8(a)(3) of the Labor Act authorizes employers and unions to enter into agreements requiring "membership" in a labor organization but does not authorize them to require "agency shop" service fee payments as a condition of employment which it sharply distinguishes from the requirements of "membership."

The National Labor Relations Board has announced that it intends to seek review of the *General Motors*

case in this Court. Address of NLRB Solicitor William Feldesman to Labor Law Section of American Bar Association, San Francisco, August 1962, 50 LRR 335 (August 13, 1962).

If the *General Motors* decision is a proper construction of § 8(a)(3), then the "agency shop" is unlawful as a matter of federal law in all fifty states, not just in the several "right-to-work" states. In such event it is clear *a fortiori* that the Florida courts have no jurisdiction to regulate such an agreement, for regulation by the Florida courts would inescapably conflict with the exclusive regulatory power of the Labor Board to prohibit the "agency shop" as an unfair labor practice.

If this Court grants review to the decision of the Sixth Circuit in the *General Motors* case, it is imperative that the Court simultaneously review the instant case. In the event that this Court should affirm the Sixth Circuit's decision, this Court should also determine whether the Florida courts may concurrently regulate the "agency shop" or whether the Florida courts must yield to the exclusive jurisdiction of the federal Labor Board. On the other hand, if this Court should reverse the decision of the Sixth Circuit, the important issues in this case remain to be resolved, *viz.*, whether the states have authority under § 14(b) to prohibit and to regulate the execution of an "agency shop" agreement in commerce.

While we believe that the Sixth Circuit in the *General Motors* case erred in its construction of § 8(a)(3), the Court is correct in distinguishing sharply between the "agency shop" and the "union shop" on grounds that the latter requires "membership" in a union and that the former does not.

V. A REAL ISSUE IN THIS CASE IS WHETHER THE ACT AUTHORIZES "RIGHT-TO-WORK" STATES TO EMASCULATE COLLECTIVE BARGAINING IN INTERSTATE COMMERCE BY REGULATING METHODS OF FINANCING COLLECTIVE BARGAINING

The ultimate question here is whether § 14(b) is a federal license to the individual states to emasculate collective bargaining in interstate commerce by criminally and civilly regulating the financing of collective bargaining functions. In labor relations, as in all other aspects of political life, the power of the purse strings is the power to control.

Did Congress intend by § 14(b) to authorize the states to exercise this kind of life-and-death control over labor relations in commerce? An examination of the scheme of the whole statute compels a negative answer, for Congres did not alter the bed-rock national labor policy to eliminate "obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining" when it enacted § 14 (b). Section 1, 29 U.S.C. § 151. The Court's language in striking down another Florida statute, which sought to license union representatives is equally applicable to Florida's regulation of the "agency shop": It "'stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress,'" which "cannot be created consistently with the Federal Act." *Hill* v. *Florida*, 325 U.S. 538, 542-543 (1945).

The Court may take judicial notice of the fact that the retail sales and service industries are peculiarly marked by very high employment turnover and by very low wages, one caused by the other. Without the agency shop to offset the unstable employment picture, the poverty stricken local unions will continue to face

enormous obstacles in achieving equality of bargaining power and effective collective bargaining. The Florida court's decision, and holdings of the same character in other states, stand as obstacles to the fulfillment of the national labor policy.

The "agency shop" contract in question requires employees who are not members of petitioner to pay a share of the costs of valuable collective bargaining. No issue of the reasonableness of the amount has been raised, nor have respondents ever challenged the value of the benefits they have received as a result of the union's efforts and services on their behalf. Petitioner has a legally enforceable duty under federal law to represent *all* bargaining unit employees fairly, including respondents, regardless of their union membership. *Steele* v. *Louisville & Nashville R. Co.*, 323 U.S. 192 (1944); *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953); *Syres* v. *Oil Workers*, 350 U.S. 892 (1955). See generally Cox, The Duty of Fair Representation, 2 Vill. L. Rev. 151 (1957).

This Court has said that non-members are entitled even to express their views on the union's collective bargaining policies and to receive notices and opportunity for a hearing on the union's proposed actions. *Steele* v. *Louisville & Nashville R. Co., supra*, 323 U.S. at 204:

> "So long as a labor union assumes to act as the statutory representative of a craft it cannot rightly refuse to perform the duty, which is inseparable from the power of representation conferred upon it, to represent the entire membership of the craft. While the statute does not deny to such a bargaining labor organization the right to determine eligibility to its membership, it does require the union, in collective bargaining and in

> making contracts with the carrier, to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith. Whenever necessary to that end, the union is required to consider requests of non-members of the craft and expressions of their views with respect to collective bargaining with the employer and to give them notice of and opportunity for hearing upon its proposed action."

Would Congress have imposed this duty of fair representation on a bargaining agent and at the same time authorized the states to regulate the agent's finances in such a manner as to make performance of that duty impossible or, at best, extremely difficult? Such an incongruous result would require a clear Congressional mandate which is lacking in § 14(b). Congress has long been aware that a union must have a regular and predictable source of funds to negotiate, administer and enforce contracts, adjust grievances, participate in arbitration, counsel employees, conduct strikes, and engage in the dozens of other vital functions of collective bargaining agent. This Court has recently said that a "union is a service agency . . . whenever it does its job." *Local 357, Teamsters* v. *NLRB,* 365 U.S. 667, 675-676 (1961). Without a regular and predictable source of finances how can a union engage in effective collective bargaining?

By prohibiting an historically established, internationally adopted method of financing collective bargaining functions, totally unrelated to union "membership" in its commonly used and understood sense, the Supreme Court of Florida has improperly entered an area exclusively regulated by federal law and has erroneously interpreted federal law to achieve a result contrary to the "fundamental purpose of the Act . . .

to protect interstate and foreign commerce from interruptions and obstructions caused by industrial strife." *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 237 (1938). The Florida court's decision is a crucial one requiring the ultimate reviewing power of this Court, for the decision below strikes hard at the national labor policy.

A further and imperative reason for this Court to review the instant case is that the Florida Supreme Court, like several other state courts, has asserted that this Court's decision in *Algoma Plywood & Veneer Co.* v. *Wisconsin Employment Relations Board*, 336 U.S. 301 (1949), is dispositive of the jurisdictional and substantive issues herein (R. 29). See also *Higgins* v. *Cardinal Mfg. Co.*, 188 Kan. 11, 360 P. 2d 456 (1961), *cert. denied sub nom. General Drivers* v. *Higgins*, 368 U.S. 829 (1961). The Supreme Court of Florida asserts (R. 29):

> "This question as to jurisdiction has been decided contrary to that contention in three recent cases of this kind in appellate courts in Arizona, Indiana and Kansas. We hold, as was held in those cases, that the Algoma case of 1949 which sanctioned state regulation of union security agreements impinging on state right to work laws has not been overruled in that respect by the subsequent decisions of the United States Supreme Court dealing with this question of pre-emption."

The *Algoma* case decided a different issue in an entirely different context, involving a state court decision which arose before the enactment of § 14(b), although decided subsequent to § 14 (b)'s enactment. This Court's holding in *Algoma* does not deal with the meaning of "membership in a labor organization" in

§ 14(b), yet it is regularly relied upon by the state courts as dispositive of the entire "agency shop" issue, an issue whose prominence is quite recent in labor relations. We believe it is imperative, therefore, that the Court should also decide whether the state courts' great reliance on *Algoma* is justified, particularly in view of this Court's subsequent decision in *Plankington Packing Co.* v. *Wisconsin Employment Relations Board*, 338 U.S. 953 (1950) (*per curiam*), and in many other, subsequent preemption cases.

CONCLUSION

For the foregoing reasons it is respectfully urged that this Court should issue its writ of certiorari to review the decision below.

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August 24, 1962.

APPENDIX

Not Final Until Time Expires to File Rehearing Petition and, If Filed, Determined

IN THE SUPREME COURT OF FLORIDA

January Term, A. D. 1962

Case No. 31,465

ALBERTA SCHERMERHORN, LOIS DEVITA, JOYCE E. THURO, and LARRY STARK, *Appellants*,

v.

LOCAL 1625 OF THE RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO; WILLIAM TRAVIS, President of local 1625 of the Retail Clerks International Association, AFL-CIO; and FOOD FAIR STORES, INC., SOUTHERN DIVISION, a Pennsylvania corporation, authorized to do business in Florida, *Appellees*.

Opinion filed April 25, 1962

An Appeal from the Circuit Court for Dade County, Pat Cannon, Judge Bernard B. Weksler, for Appellants.

Claude Pepper Law Offices, S. G. Lippman (Washington, D. C.), Tim L. Bornstein (Washington, D. C.), and Kaplan, Ser & Abrams, for Local 1625 of the Retail Clerks International Association, AFL-CIO, et al. and Aronovitz, Aronovitz & Haverfield and Robert M. Haverfield for Food Fair Stores, Inc., Southern Division, Appellees.

Bolles & Prunty for John Hancock Mutual Life Insurance Company; Allen Clements, J. Albert Woll (Washington, D. C.) and Theodore J. St. Antoine (Washington, D. C.) for American Federation of Labor and Congress of Industrial Organizations and Florida State Federated Labor Council; John L. Kilcullen (Washington, D. C.) and T.

David Burns, for Florida Right to Work Committee, Amicus Curiae.

HOBSON, J.

The appellants, plaintiffs in the action below, sought by an action in equity to enjoin the appellee labor union and Food Fair Stores from enforcing the provisions of an "Agency Shop" clause contained in a collective bargaining contract between the union and Food Fair. The contract provision under attack provides that employees who are not union members "shall be required to pay as a condition of employment, an initiation service fee and monthly service fees to the union," such amounts being equal to the initiation fees and monthly dues for union members. The appellants are non-union employees of Food Fair. It is their contention that the agency shop provision of the contract violates the "right to work" provision of the Declaration of Rights of the Florida Constitution, Section 12.

A motion to dismiss the complaint was filed on the grounds, first, that the matter was one within the exclusive jurisdiction of the National Labor Relations Board by virtue of the provisions of 29 U.S.C.A. §§ 141-188, and also that the contract provision does not violate Section 12 of the Declaration of Rights.

The trial court granted the motion to dismiss and entered a final order wherein it was stated in part:

> ". . . the Complaint . . . is hereby dismissed for the reason that the court finds that the agency shop clause, Section 2, Article 19 of the contract between the defendant Union and defendant Food Fair is not violative of the Florida 'right to work law' as contained in Section 12 of the Declaration of Rights of the Constitution of Florida . . ."

The cause was appealed to the District Court of Appeal, Third District. The District Court heard arguments and

filed an opinion in which the decree of the chancellor was reversed and the cause remanded. Before that decision became final the appellees filed a motion to the court to withdraw its opinion and transfer the appeal to this court, asserting that the appeal should have been made directly to this court because the decision was one "construing a controlling provision of the Florida Constitution." Article V, Section 4, Florida Constitution. The District Court granted the motion and transferred the cause to this court, and entered an order withdrawing its opinion, conditioned upon this court's accepting jurisdiction. The initial question with which we are faced is whether we have jurisdiction to determine this cause on a direct appeal.

In our judgment, the chancellor's order quoted above clearly and unquestionably construes Section 12, Declaration of Rights. Unlike in Milligan v. Wilson, Fla., 104 So. 2d 35, and Carmazi v. Board of County Commissioners, Fla., 104 So. 2d 727, the issues in the instant case required the trial court to rule directly on a constitutional provision. Moreover, the fact that there was such a direct ruling appears from the face of the lower court's order. The question is whether the ruling amounts to a construction of Section 12, Declaration of Rights. As stated in Armstrong v. City of Tampa, Fla., 106 So. 2d 407, and in Cohen v. State, Fla., 121 So. 2d 155, the trial court will be held to have construed a controlling provision of the constitution if the court undertakes to "eliminate existing doubts arising from the terms of the constitutional provision." In the instant case, there were "existing doubts," inasmuch as it has never before been determined by an appellate court in this State whether an agency shop clause contravenes the "right to work" amendment of our Constitution. The trial court undertook to eliminate these doubts by squarely holding that the contract clause was valid.

The Chancellor did not merely apply the facts "to a recognized clear-cut provision of the Constitution," as in

Page v. State, Fla., 113 So. 2d 557, because the right to work clause is not "clear-cut" when considered in connection with the facts presented in the instant case. On the contrary, the trial court was confronted with, and decided, a legitimate constitutional question of first impression.

In Boyd v. Dade County, Fla., 123 So. 2d 323, we recognized that it was the plain constitutional plan of Article V, Section 4, "that judgments construing controlling provisions of the Florida Constitution, being of such great importance to all the people, should be decided by direct appeals to the one court beyond which there can be no further appeal." (Emphasis supplied.) Certainly, the constitutional question decided in the instant case is of no less importance to the general public merely because the chancellor did not see fit to launch into an extended dissertation giving his reasons for construing the constitutional provision as he did. Moreover, since the order on its face shows that the constitution was construed, this is not a case where it is necessary that we return the cause to the chancellor for a determination as to the basis of his ruling.

In the case of Boyd v. County of Dade, Fla., 123 So. 2d 323, we held that we had jurisdiction on direct appeal because the trial court had construed a controlling provision of the Florida Constitution in its order denying a motion for a jury trial in the Metropolitan Court of Dade County. The pertinent portion of the trial court's order was as follows:

> "'* * * after hearing argument of counsel and carefully considering each of the constitutional rights raised by the defendant for trial by jury and being otherwise fully advised in the premises, finds that the grounds given by the defendant in his request for a jury trial are not applicable to this Court. * * *.'"

Since, by virtue of the above quoted order, it was held that this court had jurisdiction on direct appeal, it is equally clear in the instant case that the trial court construed a controlling provision of the Florida Constitution within the meaning of Article V, Section 4, and that we therefore possess jurisdiction to determine this cause on direct appeal.

Upon full consideration of the arguments and briefs of the parties, as well as the briefs of the various amici curiae, we are of the opinion that the judgment of the trial court must be reversed for the reasons set forth herein and in the excellent and learned opinion prepared for the District Court of Appeal, Third District, by Judge CARROLL, which is hereinafter set out in haec verba.

The portion of Section 12 of the Declaration of Rights which is in issue, reads as follows:

> "The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union, or labor organization; provided, that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer."

This section clearly bestows on the workingman a right to join or not to join a labor union, as he sees fit, without jeopardizing his job. Inasmuch as the Constitution has granted this right, the agency shop clause is repugnant to the Constitution in that it requires the non-union employee to purchase from the labor union a right which the Constitution has given him. The Constitution grants a free choice in the matter of belonging to a labor union. The agency shop clause contained in the contract under consideration purports to acknowledge that right, but in fact, abrogates it by requiring the non-union worker to pay the union for the exercise of that right or, in the alternative, to be discharged from his employment. Such an arrangement

is palpably and totally inconsistent with the freedom of choice contemplated by our Declaration of Rights, Section 12.

The appellees contend that, except for the "agency-shop" provision, the non-union employees of the appellant Food Fair would be "free riders," that is, they would reap the benefits of union representation without having to bear any of the cost thereof. This argument is grounded on the fact that the union is, by law, the bargaining agent for all employees—those who do not belong to the union as well as those who do. 29 U.S.C.A. §159. This argument may be answered by reference to the section of the Constitution under consideration. Clearly, it is the intent of this section to leave as a matter for *individual determination and preference* the question of whether the worker will derive any benefit from association with a labor union. The choice is his to make. Presumably, the appellants in the instant case have decided that union membership is not an overall benefit to them personally, else they would have joined.

The appellees further assert that our state courts are without jurisdiction to determine this matter, because of the pre-emption by the federal government of the field of labor relations, by virtue of the Labor Management Relations Act, 29 U.S.C.A. §§ 141-188. We hold, as did the Supreme Court of Kansas in the case of Higgins v. Cardinal Manufacturing Company, 188 Kan. 11, 360 P. 2d 456, that Section 14(b) of the Taft-Hartley Act [29 USCA § 164(b)] preserves the jurisdiction of the states in matters involving state "right-to-work" provisions. It is true that Section 14 (b) specifically deals only with "agreements requiring *membership* in a labor organization as a consideration of employment . . ." However, it is not to be presumed that Congress would preserve to the states the field of right-to-work legislation, while, at the same time, intending that unions and management could, by the use of subterfuge of an agency shop clause, circumvent and, in effect, nullify a

paramount provision of the organic law of any of the several states.

A recent decision of the Federal District Court of Nevada, as yet unreported, squarely supports our holding herein regarding the power of the states under Section 14(b) to prohibit the enforcement of agency shop agreements. In that case, the court held that although the literal language of Section 14(b) only reserves to the states the right to prohibit agreements making union *membership* compulsory, it would frustrate the congressional intent to construe that section so as to prevent the states from also prohibiting agency shop agreements. In its opinion, the District Court stated:

> "Section 14(b) be bereft of meaning if we were to construe it in a fashion which would render the states powerless to make illegal that type of union security agreement which imposes liabilities on the working man which, realistically, are the same liabilities, which under the section, the states may remove." Amalgamated Association of Street, Electric Railway and Motor Coach Employees, Division 1225 v. Las Vegas-Tonopah-Reno Stage Line, Inc., U.S.D.C. Nev., January 12, 1962; 30 U.S. L. Week 2392.

Having thus expressed the opinion of this court on the question of its jurisdiction as well as the chief issues involved in this case, we hereby approve and adopt as our own the following unpublished opinion by the District Court of Appeal, Third District, prepared by CARROLL, J.:

"The appellants, who were plaintiffs below, filed suit in equity for themselves and for all others similarly situated, against Food Fair Stores, Inc., Southern Division, a Pennsylvania corporation doing business in Florida, and the appellee labor union and its president, to enjoin the application to plaintiffs and other non-union employees of any

'agency shop contract' between the employer and the union.[1] The contract provided that employees who were not members of the union 'shall be required to pay as a condition of employment, an initiation service fee and monthly service fees to the union,' being the amounts union members pay for initiation and for monthly dues.

"The complaint charged the contract violated the right to work provisions of the Florida Constitution[2] and statutes.[3] The trial court rejected that contention and rendered judgment for defendants, holding that the agency shop contract was not in violation of the Florida right to work law, and the plaintiffs appealed.

"In a motion to dismiss in the trial court and again here the defendants-appellees contended that the controversy is one within the jurisdiction of the National Labor Relations Board,[4] under § 8 of the Act (29 U.S.C.A. § 158),

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"[1] Through representing the majority, the union had gained the right under the law to act as bargaining agent for all of the employees. § 8 (a)(5), National Labor Relations Act, 29 U.S.C.A. § 158 (a) (5); § 9(a), 29 U.S.C.A. 159 (a).

"[2] '* * * The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union, or labor organization; provided, that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer. * * *' Fla. Const., Declaration of Rights, § 12, 25 F.S.A.

"[3] §§ 447.01 and 447.09, Fla. Stat., F.S.A.

"[4] Essential to that contention was that the business involved be one engaged in interstate commerce. The record shows no allegation or reference to the subject matter being within the flow of interstate commerce. But we proceed on the assumption that it is, since the parties so treated it in argument. See Wood, Wire & Metal Lathers International Union v. Babcock Co., decided July 31, 1961, ... So. 2d ....,

and that as a consequence we are required to yield jurisdiction to the Board.[5]

This question as to jurisdiction has been decided contrary to that contention in three recent cases of this kind in appellate courts in Arizona, Indiana and Kansas.[6] We hold, as was held in those cases, that the Algoma case[7] of 1949 which sanctioned state regulation of union security agreements impinging on state right to work laws has not been overruled in that respect by the subsequent decisions of the United States Supreme Court dealing with this question of pre-emption. Not only has Algoma not been expressly overruled, but it has repeatedly been recognized and cited with apparent approval in the later United States Supreme Court cases. See Colgate-Palmolive-Peet Co. v. N.L.R.B., 338 U.S. 355, 70 S. Ct. 166, 94 L. Ed. 161, 168; Garner v. Teamsters C. & H. Union, 346 U.S. 485, 74 S. Ct. 161, 98 L. Ed. 228, 238; Weber v. Anheuser-Busch, 348 U.S. 468, 75 S. Ct. 480, 99 L. Ed. 546, 556; Guss v. Utah L.R.B., 353 U.S. 1, 77 S. Ct. 598, 1 L. Ed. 2d 601, 607; Local 24

"[5] This court has repeatedly recognized the doctrine of federal pre-emption and ceded jurisdiction to the Board in cases where it was shown to be required. See Amalgamated Clothing Workers, etc. v. Donald S. La Vigne, Inc., Fla. App. 1958, 111 So. 2d 462; International Ladies Garment W.U. v. Sherry Mfg. Co., Fla. App. 1959, 115 So. 2d 27; 'International Hod Carriers', etc. v. Heftler Const. Co., Fla. App. 1959, 116 So. 2d 30; North Dade Plumbing, Inc. v. Bowen, Fla. App. 1960, 116 So. 2d 790; I.B. of E. W. Local 349 v. Shires, Fla. App. 1960, 123 So. 2d 259; Casteel v. United Brotherhood of Carpenters & Join., Fla. App. 1960, 125 So. 2d 123; Wood, Wire & Metal Lathers International Union v. Babcock Co., supra.

"[6] Sheet Metal Workers International Ass'n. v. Nichols, (1961), 89 Ariz. 187, 316 P. 2d 204; Meade Electric Company v. Hagberg, (1959), 129 Ind. App. 631, 159 N.E. 2d 408; Higgins v. Cardinal Manufacturing Company, (1961), 188 Kan. 11, 360 P. 2d 456.

"[7] Algoma P. & V. Co. v. Wisconsin Emp. Rel. Bd., 336 U.S. 301, 69 S. Ct. 584, 93 L. Ed. 691.

of I.B. of T.C.W. v. Oliver, 358 U.S. 283, 79 S. Ct. 297, 3 L. Ed. 2d 312, 321; San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 785, 788 (concurring opinion). As late as 1959, in the Oliver case, in footnote 10, it was said (358 U.S. at 296):

> 'In Algoma, state law was allowed to operate to restrict a provision of a collective bargaining contract only after it was found after an exhaustive examination of the legislative history of the Wagner Act that Congress intended to leave the special subject of the legality of maintenance of membership clauses up to the States through § 8(3) of that Act, 49 Stat. 452. Questions of the nature that we consider today were expressly left open. 336 US at 312.' This exception from the federal pre-emption doctrine seems an obvious one brought about by § 14(b) of the Federal Act,[8] which specifically authorizes and recognizes the validity of right to work laws of the several states. We agree with the statement of the Kansas Supreme Court on this point, where it was said: 'There would be little point in permitting the states to enact such [right to work] laws if they could not be enforced by the states.'[9]

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[8] 'Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.' 29 U.S.C.A. § 164(b).

[9] In support of the argument for pre-emption appellees referred to a recent instance in which the National Labor Relations Board took jurisdiction of a matter which was claimed to have dealt with the question of an agency shop contract vis-a-vis a state right to work law. The ruling involved (130 N.L.R.B. No. 54), which concerned General Motors Corporation, was made in February of 1961, and is found in 4 C.C.H. Law Rep., N.L.R.B. decision § 9663, p. 14,978. Examination of that ruling shows the question before the Board was not whether the *making and application* of an agency shop contract was violative of a state right to work law

"The chancellor was eminently correct in assuming jurisdiction and in not ceding it to the Board in this instance. But we hold that the chancellor was in error in ruling that this agency shop contract does not violate the Florida right to work law.

"Appellants contend the agency shop contract denies or abridges their right to work in violation of the Florida right to work law, by exacting tribute from them because of their non-membership in the union as a condition of their employment or continued employment.

"Appellees argue that because the union has gained the right to act as bargaining agent for all of the employees it is only fair that the non-member sector of the employees should have to pay money to the union as a condition of their right to work, to help the union defray the cost of such bargaining.

"Regarding the intent and policy of this state's right to work law, the Supreme Court of Florida in Local Union No. 519 v. Robertson, Fla. 1952, 44 So. 2d 899, 902, said:

> 'By these provisions of the Constitution and the statutes the public policy of the State of Florida with respect to labor activities and labor opportunities has been set forth and defined. Under these provisions it is the declared public policy of the State that all work-

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(which question, as recognized in the Algoma case is reserved to the state for determination), but the question before the Board was whether, in a state having a right to work law, refusal of an employer to bargain with a union with respect to inclusion of an agency shop clause in a bargaining contract was an unfair labor practice. Interestingly, the Board upheld the employer's refusal to bargain under those circumstances. Appellees strongly urged that such ruling of the Board constituted evidence and precedent for pre-empting jurisdiction of the matter involved here, but from the nature of the question which was before the Board, as we have pointed out, the action of the Board in that instance could not be given the effect which the appellee assigned to it.

ing men, whether union or non-union, shall be considered on an equal footing with respect to labor opportunities. They are guaranteed complete freedom of decision in whether to join or refrain from joining any labor organization. *No person or organization may deny them the right of obtaining or retaining employment, nor may the right be abridged, by reason of membership or nonmembership in any labor organization.* They are not to be coerced or intimidated in the enjoyment of their legal rights, including the right of free decision as to whether or not they will join a union, and any person or labor organization who so coerces or intimidates them is to be deemed guilty of a crime punishable by fine or imprisonment, or both.' [Italics supplied.]

"Under § 12 of the Declaration of Rights of Florida what is prohibited is the denial or *abridgement* of one's right to work 'on account of membership or non-membership in any labor union, or labor organization.' When, because of his non-membership, an employee is required to pay labor union dues, or sums equal to the dues, as a condition of employment or continued employment, his right to work is 'abridged.'

"Anything which imposes a charge or expense upon the free exercise of a right, abridges it in the sense of curtailing or lessening the use of enjoyment of that right. As defined in Webster's New International Dictionary, to abridge is 'to deprive; to cut off; to diminish, curtail.' And 'abridge' is defined in The Oxford English Dictionary as being 'to curtail, to lessen, to diminish (rights, privileges, advantages, or authority.)' The Louisiana Supreme Court adopted this meaning and definition of *abridged* as contained in the right to work law of that state,[10] saying:

"[10] Piegts v. Amalgamated Meat Cutters, etc., 228 La. 131, 81 So. 2d 835, 838.

'The public policy of Louisiana is expressed in the Right to Work Act, Section 1, supra. In analyzing "the right of a person or persons to work shall not be denied or *abridged* on account of membership or nonmembership in any labor union or labor organization", we must look to the meaning of the word "abridged". A study of various law dictionaries and Webster's Dictionary will show that the Legislature intended the word "abridged", as used in the Act, to mean "diminished, reduced, curtailed, or shortened".'

"The natural and reasonable interpretation of the Florida constitutional amendment, which prohibits compulsory membership in a labor organization as a condition of employment or of continued employment, is that it necessarily forbids forcing a non-member employee to pay union initiation fees, dues and assessments or equivalent amounts as a condition of employment or of continued employment. A contrary construction of the right to work law would leave it little or no useful purpose to serve.[11]

"For the reasons stated, we are impelled to hold that the 'agency shop' provision in the contract here under attack violates § 12 of the Declaration of Rights of Florida, which declares the right to work policy of this state. Accordingly, the decree is reversed and the cause remanded for further proceeding not inconsistent herewith.

"Reversed and remanded."

Regarding Footnote [9] of the foregoing opinion, it should be pointed out that the NLRB has since receded from its opinion in the General Motors Corporation case, 130 N.L.R.B. No. 54. See 133 N.L.R.B. No. 21. Likewise,

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"[11] *Accord*, Sheet Metal Workers International Ass'n. v. Nichols, supra, 89 Ariz. 187, 316 P. 2d 204; Higgins v. Cardinal Manufacturing Company, supra, 188 Kan. 11, 360 P. 2d 456. *Contra*, Meade Electric Company v. Hagberg, supra, 129 Ind. App. 631, 159 N.E. 2d 408.

it should be noted that on December 15, 1961, the Supreme Court of the United States denied a petition for certiorari in the case of Higgins v. Cardinal Manufacturing Company, supra, Footnote [6].

For the reasons stated in our own opinion, and in the opinion adopted by us, the decree is reversed and the cause remanded for further proceedings not inconsistent herewith.

It is so ordered.

ROBERTS, C.J., DREW and THORNAL, J.J., and PARKS, Circuit Judge concur

THOMAS, J., dissents because of lack of jurisdiction

O'CONNELL, J., dissents as to jurisdiction, concurs as to merits

O'CONNELL, J., Dissenting.

I must dissent because I am of the opinion that this court does not have jurisdiction to decide this caise. However, I fully agree with the opinion on the merits of this cause.

Mandate from Supreme Court of Florida

To the Honorable, the Judges of the Circuit Court for the Eleventh Judicial Circuit of Florida. Greeting:

WHEREAS, Lately in the Circuit Court of the Eleventh Judicial Circuit, in and for the County of Dade in a cause wherein

(Circuit Court No. 60C 11562—IN CHANCERY)

ALBERTA SCHERMERHORN, LOIS DEVITA, JOYCE E. THURO, and LARRY STARK, individually, as well as in a representative capacity on behalf of each and all other persons of a multitudinous class to which they belong and which is similarly situated, were *plaintiffs*

and

LOCAL 1625 OF THE RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO; WILLIAM TRAVIS, President of Local 1625 of the Retail Clerks International Association, AFL-CIO; and FOOD FAIR STORES, INC., SOUTHERN DIVISION, a Pennsylvania corporation, registered to do business in the State of Florida, were *defendants*

the Decree of said Circuit Court was rendered Dec. 23, 1960 as by the inspection of the transcript of the record of the said Circuit Court which was brought into the Supreme Court of the State of Florida, by virtue of an appeal agreeably to the laws of said State in such case made and provided, fully and at large appears:

AND WHEREAS, at the January Term of said Supreme Court holden at Tallahassee, A. D. 1962, the said cause came on to be heard before the said Supreme Court on the said transcript of the record and was argued by counsel; in consideration whereof, on the 25th day April A. D. 1962 the said Supreme Court rendered its opinion and judgment in said cause as per copy thereof hereto attached and made a part hereof.

In Consideration Whereof, It Is Ordered by the Court that the Appellant do have and recover of and from the appellees costs in this behalf expended herein taxed at Twenty-Five Dollars, and that all other costs shall be taxed in the court in which the appeal was entered, therefore,

YOU ARE HEREBY COMMANDED, That such further proceedings be had in said cause as according to right, justice, the judgment of said Supreme Court, and the laws of the State of Florida, ought to be had, the said Decree of the Circuit Court notwithstanding.

WITNESS, The Honorable B. K. ROBERTS
Chief Justice of said Supreme Court, and the seal of said Court at Tallahassee, this 14th day of May 1962

(SEAL) /s/ GUYTE P. MCCORD
Clerk Supreme Court of Florida.

IN THE SUPREME COURT OF FLORIDA
July Term, A. D. 1962
Wednesday, July 18, 1962

ALBERTA SCHERMERHORN, LOIS DEVITA, JOYCE E. THURO, and LARRY STARK, *Appellants*,

v.

LOCAL 1625 OF THE RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO; WILLIAM TRAVIS, President of Local 1625 of the Retail Clerks International Association, AFL-CIO; and FOOD FAIR STORES, INC., SOUTHERN DIVISION, a Pennsylvania corporation, authorized to do business in Florida, *Appellees*.

Upon consideration of the application for additional stay of Local 1625 of the Retail Clerks International Association, AFL-CIO, and William Travis, President thereof, appellees in the above cause, it is ordered that the execution and enforcement of the judgment of this Court entered in said cause April 25, 1962, be and is hereby stayed until August 23, 1962, to enable said applicants to have a reasonable time in which to apply for and to obtain, if they can, a review of said cause by the Supreme Court of the United States, and if such proceeding is perfected and filed in the Supreme Court of the United States on August 23, 1962, that said judgment be further stayed until said proceeding is disposed of by the Supreme Court of the United States or until the further order of this Court. This order is subject to cancellation at any time if petitioner fails to prosecute such review with reasonable dispatch.

It is further ordered that the Circuit Court in and for Dade County (the trial court in this cause) hold the mandate in this cause heretofore transmitted to said Clerk by the

Supreme Court of Florida without further action thereon during said stay period.

A True Copy
TEST:
GUYTE P. McCORD
Clerk Supreme Court.
By: ELLA O'NEILL WILKINS
Deputy Clerk.

IN THE SUPREME COURT OF FLORIDA
July Term, A. D. 1962
Wednesday, May 23, 1962

ALBERTA SCHERMERHORN, LOIS DEVITA, JOYCE E. THURO, and LARRY STARK, *Appellants*,

v.

LOCAL 1625 OF THE RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO; WILLIAM TRAVIS, President of Local 1625 of the Retail Clerks International Association, AFL-CIO; and FOOD FAIR STORES, INC., SOUTHERN DIVISION, a Pennsylvania corporation, authorized to do business in Florida, *Appellees*.

Upon consideration of the application of Local 1625 of the Retail Clerks International Association, AFL-CIO, and William Travis, President thereof, appellees in the above cause, it is ordered that the execution and enforcement of the judgment of this Court entered in said cause April 25, 1962, be and is hereby stayed for ninety (90) days from April 25, 1962, to enable said applicants to have a reasonable time in which to apply for and to obtain, if they can, a review of said cause by the Supreme Court of the United States, and if such proceeding is perfected and filed in the Supreme Court of the United States within said ninety (90) day period, that said judgment be further stayed until

said proceeding is disposed of by the Supreme Court of the United States or until the further order of this Court. This order is subject to cancellation at any time if petitioner fails to prosecute such review with reasonable dispatch.

It is further ordered that the Circuit Court in and for Dade County (the trial court in this cause) hold the mandate in this cause heretofore transmitted to said Clerk by the Supreme Court of Florida without further action thereon during said stay period.

A True Copy
TEST:

GUYTE P. MCCORD
Clerk Supreme Court.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
July Term, A.D. 1961
Thursday, September 14, 1961
Case No. 61-7

ALBERTA SCHERMERHORN, LOIS DEVITA, JOYCE E. THURO, and LARRY STARK, *Appellants,*

v.

LOCAL 1625 OF THE RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO; WILLIAM TRAVIS, President of Local 1625 of the Retail Clerks International Association, AFL-CIO; and FOOD FAIR STORES, INC., SOUTHERN DIVISION, a Pennsylvania corporation, authorized to do business in Florida, *Appellees.*

Following the filing on August 31, 1961, of our opinion and judgment but before issuance of our mandate, appellees moved this court to withdraw its opinion and transfer the

cause to the Supreme Court, asserting the appeal should have been made to the latter court because, they contend, the decision of the trial court was one "construing a controlling provision of the Florida constitution" (Art. V, Section 4(2), Fla. Const., 26 F.S.A.) and therefore excluded from our jurisdiction as prescribed in Art. V, Section 5(3), ibid.

On consideration of said motion and on authority of the recent Supreme Court decision in Robinson v. State, filed July 14, 1961, ... So. 2d ...., and in order that the question as to jurisdiction over this appeal may be determined by the court of paramount jurisdiction, we make this transfer of the cause to the Supreme Court under rule 2.1(5)(d), F.A.R.; and to effectuate this order our mandate is stayed, and if the Supreme Court takes jurisdiction of the appeal our opinion and judgment filed herein on August 31, 1961, shall stand vacated without further order; but if the Supreme Court concludes it does not have jurisdiction of the appeal then our said opinion and judgment will remain in force and our mandate will be directed to issue thereon.

Accordingly, and on the basis outlined hereinabove, it is ordered that the notice of appeal together with all papers filed prior to September 21, 1961, shall on that date be transferred to the Supreme Court of Florida as the proper court having jurisdiction in this case.

A True Copy
ATTEST:

/S/
Clerk District Court of
Appeal Third Circuit

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA IN CHANCERY

No. 60C 11562

ALBERTA SCHERMERHORN, LOIS DEVITA, JOYCE E. THURO, and LARRY STARK, individually, as well as in a representative capacity on behalf of each and all other persons of a multitudinous class to which they belong and which is similarly situated, *Plaintiffs*,

v.

LOCAL 1625 OF THE RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO; WILLIAM TRAVIS, President of Local 1625 of the Retail Clerks International Association, AFL-CIO; and FOOD FAIR STORES, INC., SOUTHERN DIVISION, a Pennsylvania corporation, registered to do business in the State of Florida, *Defendants*.

Judgment for Defendants

This cause came on to be heard after due notice to the parties upon the plaintiffs' prayer for temporary injunction contained in the Complaint herein and upon Response to Application for Temporary Injunction, Motion to Dismiss and verified Answer of the defendants Local 1625 of the Retail Clerks International Association, AFL-CIO and William Travis, president thereof, at which hearing were present the plaintiffs, their counsel, the defendant Travis, representatives of the other defendants and their counsel, and witnesses for the parties, at which time the Court heard preliminary statements from counsel for the various parties as to the contentions and positions of the parties, at which time counsel for defendant Food Fair moved ore tenus to adopt the defensive motions filed by the other defendants, which motion was granted by the Court, and, after reserving ruling on the defensive motions, heard testimony of the plaintiffs and their witnesses and received documentary

evidence on behalf of the plaintiffs and defendants and the depositions of the individual plaintiffs taken on behalf of the defendants, and heard argument of counsel, and the Court being otherwise fully advised in the premises, upon consideration thereof;

It is ORDERED, ADJUDGED and DECREED as follows:

1. That the prayer for temporary injunction contained in the Complaint be and is hereby denied.

2. That the Motions to Dismiss of the defendants be and are hereby granted and the Complaint in this cause be and is hereby dismissed for the reason that the Court finds that the agency shop clause, Section 2, Article 19 of the contract between the defendant Union and defendant Food Fair is not violative of the Florida "right to work law" as contained in Section 12 of the Declaration of Rights of the Constitution of Florida and Chapter 447, Florida Statutes.

3. That judgment in favor of the defendants herein be and is hereby granted and the plaintiffs shall go hence without day.

DONE and ORDERED in Chambers, at Miami, Dade County, Florida, this 23 day of December, 1960.

/s/ PAT CANNON
Circuit Judge

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JOHN F. DAVIS, CLERK

In The
Supreme Court of the United States
October Term, 1963

No. 13

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL 1625, AFL-CIO, and WILLIAM TRAVIS, President of Retail Clerks International Association, Local 1625, AFL-CIO,

Petitioners,

v.

ALBERTA SCHERMERHORN, LOIS DEVITA, JOYCE E. THURO, and LARRY STARK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF FOR ALBERTA SCHERMERHORN, LOIS DEVITA, JOYCE E. THURO, AND LARRY STARK, IN OPPOSITION

BERNARD B. WEKSLER
[illegible] Industrial National Bank Building
Miami 32, Florida
Counsel for Respondents

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In The
Supreme Court of the United States

October Term, 1962

No. 368

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL 1625, AFL-CIO, and WILLIAM TRAVIS, President of Retail Clerks International Association, Local 1625, AFL-CIO,

Petitioners,

v.

ALBERTA SCHERMERHORN, LOIS DEVITA, JOYCE E. THURO, and LARRY STARK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF FOR ALBERTA SCHERMERHORN, LOIS DEVITA, JOYCE E. THURO, AND LARRY STARK, IN OPPOSITION

OPINION BELOW

The opinion and decision of the court below sought to be reviewed (Appendix to the Petition, pp. 1a-14a) is officially reported in 141 So.2d 269 (1962).

JURISDICTION

The judgment of the Supreme Court of Florida was entered on April 25, 1962, and has been stayed to enable petitioners to seek review in this Court. The jurisdiction of this Court is invoked by the Petitioners under 28 U.S.C. §1257 (3). The Respondents contend that this Court lacks jurisdiction since the decision of the Florida Supreme Court is not final within the meaning of 28 U.S.C. §1257 (3). See Argument and Reasons for Denying the Writ, I, pp. 7-9.

QUESTIONS PRESENTED

I.

Has jurisdiction of this Court been properly invoked when the decision of the Florida Supreme Court is not a final judgment or decree as defined under 28 U.S.C. §1257 (3)?

II.

When Section 14(b) of the Taft-Hartley Act authorizes states to enact right-to-work laws, and state courts have the right to interpret and construe state constitutional provisions, is the Florida Supreme Court authorized to interpret and construe a Florida right-to-work constitutional provision making "agency shop" contractual devices illegal and invalid?

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED

Section 12 of the Declaration of Rights of the Florida Constitution (§12, 25 Fla. Stat. Ann.) provides as follows:

> The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union, or labor organization; provided, that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer.

Section 14(b) of the National Labor Relations Act (61 Stat. 151, 29 U.S.C. §164) provides as follows:

> Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

STATEMENT OF THE CASE

The statement of the case as set forth in the Petition (Pet., pp. 3-7) is inaccurate as the Petitioner refers to facts allegedly involved in the trial court level which are not contained in any Record presented to the Supreme Court of Florida or to this Court. The Record

Proper in this Court, insofar as the trial court is involved, filed pursuant to the requirements of Rule 21 (1), consists of the Respondents' Complaint for Injunction and Other Relief; the Petitioners' Motion to Dismiss; the Petitioners' Response to an Application for Temporary Injunction (not involved herein as a Temporary Injunction was denied by the trial court and the Respondents did not appeal from such denial); a union-management contract entered into between the Petitioners and an employer; and the Judgment for Defendant Petitioners entered by the trial court on December 23, 1960.

The Respondents, plaintiffs in the trial court, filed a Complaint in equity to enjoin the defendant labor union (a Petitioner herein), its president (a Petitioner herein), and FOOD FAIR STORES, INC., SOUTHERN DIVISION (who has not joined in the Petition) from enforcing the provisions of a collective bargaining contract between the union and Food Fair. The contract provision under attack provides that employees who are not union members *"shall be required to pay as a condition of employment, an initiation service fee and monthly service fees to the union"*, such amounts being equal to the initiation fees and monthly dues for union members. The plaintiff respondents are non-union employees of Food Fair. They contended that the "Agency Shop" provision of the contract violated the "Right-to-Work" provision of the Declaration of Rights of the Florida Constitution, Section 12. In addition to seeking an injunction, the plaintiffs prayed for a declaratory decree, an accounting and return of funds paid to the union by non-union members and for general relief.

A motion to dismiss the complaint was filed by all

the defendants on two grounds, first, that the matter was one within the exclusive jurisdiction of the National Labor Relations Board by virtue of the provisions of 29 U.S.C.A. §141-188, and second, that the "Agency Shop" contract provision did not violate Section 12 of the Declaration of Rights (R. 9-11). A Motion to Dismiss takes the place of the demurrer under old Florida practice and the purpose of a Motion to Dismiss a complaint is to ascertain if the plaintiffs have alleged a good cause of action. No testimony is received on a Motion to Dismiss. and the cause does not become at issue until the motion is ruled upon by the court, see R. App. 2-4.

The trial court granted the Motion to Dismiss and entered a Final Judgment wherein it was stated in part:

> "... the Complaint ... is hereby dismissed for the reason that the court finds that the agency shop clause, Section 2, Article 19 of the contract between the defendant Union and defendant Food Fair is not violative of the Florida 'right to work' law as contained in Section 12 of the Declaration of Rights of the Constitution of Florida ..." (R. 15-16)

The cause was appealed by the plaintiffs, respondents herein, to the District Court of Appeal, Third District. The District Court of Appeal heard arguments and filed an opinion in which the "Final Judgment" of the trial court was reversed and the cause remanded. Before that decision became final, the appellees (petitioners herein) filed a motion to the court to withdraw its opinion and transfer the appeal to the Florida Supreme Court, asserting that the appeal should have been made directly to

the Supreme Court because the decision was "one construing a controlling provision of the Florida Constitution," Article V, Section 4, Florida Constitution. The District Court granted the Motion and transferred the cause to the Supreme Court, and entered an order withdrawing its opinion, conditioned upon the Supreme Court accepting jurisdiction. The Supreme Court determined that it had the requisite appellate jurisdiction.

After oral argument and due deliberation, the Supreme Court held that the "Agency Shop" contract provision violated the state's Right-to-Work constitutional safeguard,[1] adopted in *haec verba* the vacated decision of the District Court, and remanded the cause back to the trial court for further proceedings not inconsistent with their opinion (R. 24-34). After petitioners notified the Florida Supreme Court of their intention to petition this Court for a Writ of Certiorari, the Florida Supreme Court stayed the issuance of their Mandate to the trial court.[2]

---

[1]Section 12, Declaration of Rights of Florida Constitution.

[2]The petitioners have sought to supplement the record to include the testimony of witnesses, depositions, exhibits, etc., used at a hearing on an application for temporary injunction but never used in connection with the Complaint and the Motion to dismiss. The Florida Supreme Court properly refused to supplement the record inasmuch as such suggested addition had not been before the Supreme Court when the case was argued by counsel and considered and disposed of by the Court. An order denying Petitioner's Motion to Supplement the Record was entered by the Supreme Court of Florida on August 13, 1962. See Respondents' Appendix, p. 1.

ARGUMENT AND REASONS FOR DENYING THE WRIT

I.

SINCE THE DECISION OF THE FLORIDA SUPREME COURT IS NOT FINAL, THE JURISDICTION OF THIS COURT HAS NOT BEEN PROPERLY INVOKED UNDER 28 U.S.C. §1257(3).

The decision of the Florida Supreme Court sought to be reviewed is not a final judgment or decree within the meaning of 28 U.S.C. §1257 (3). Therefore the Petitioners' attempt to invoke the jurisdiction of this Court under said section (Pet. p. 2) is improper.

As shown by the Complaint for Injunction and Other Relief filed in the trial court, the plaintiff Respondents prayed, inter alia, to enjoin the application of union-management contract provision, for a declaratory judgment, for an accounting, and for general relief (R. 1-8). The Petitioners filed a Motion to Dismiss the Complaint (R. 9-11) which Motion raised as a question of law, the sufficiency of the facts alleged to state a cause of action. The purpose of a Motion to Dismiss a complaint is to ascertain if the complaint alleges a good cause of action. *Connolly v. Sebeco, Inc.* Fla., 89 So.2d 482 (1956)

The trial Chancellor entered an order granting the Motion to Dismiss and entered a Judgment for Defendants (R. 15, 16). On appeal to the Supreme Court of Florida, the Judgment for the Petitioner Defendants was reversed and the *cause remanded to the trial court for*

further proceedings not inconsistent with the opinion. (R. 34)

For a decision of the highest state appellate court to be final within the meaning of 28 U.S.C. §1257 (3), it must end the litigation by fully determining the rights of the parties so that nothing remains to be done by the trial court except the ministerial act of entering the judgment which the appellate court has directed. See *Gospel Army v. City of Los Angeles*, 331 U.S. 543 (1947).

Under established Florida rule (similar to Federal rule) when a Motion to Dismiss is denied, the movent files an Answer incorporating any and all defenses and the cause then arrives at issue (see Appendix p. 4). The Florida Supreme Court in reversing the trial court and remanding the cause has merely opened the "pleading" door for the Petitioners to file an Answer and have the cause arrive at issue. The reversal of the trial court's ruling granting the Petitioners' Motion to Dismiss produced only the same effect as if the trial court had initially overruled the Motion to Dismiss and directed the Petitioners to file an Answer.

In injunction proceedings a judgment of the highest state court is final only where it effectively disposes of the action. Thus a judgment lacks finality if it does no more than rule on a motion to dissolve the injunction, regardless of how it decides that issue, leaving final disposition of the proceeding until later. *Gibbons v. Ogden*, 6 Wheat 448. We have not yet had the trial court either enter or deny a permanent injunction in the instant case, decide on an accounting or award damages.

Before this Court can exercise jurisdiction, it must be clear that definitive disposition has been made of *all* the legal and factual issues in the case, not just the important ones or the federal ones. Thus, the requirement of finality has not been met merely because one major issue in a case has been decided and a number of issues remain to be tied up. See *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 68 (1948); *Bruce v. Tobin*, 245 U.S. 18 (1917).

Inasmuch as the cause has been remanded back to the trial court for "further proceedings" and the trial court's future role is more than the ministerial act of entering a judgment ordered by the appellate court, it is clear that at the present stage of the cause, it does not conform to the standards required for a final judgment under the Florida or Federal laws. Therefore, this case is not ripe for review as the Florida Supreme Court's opinion is not a final judgment for purposes of review under 28 U.S.C. §1257 (3). See *Montgomery Bldg. & Constr. Trades Council v. Ledbetter Erection Co.*, 344 U.S. 178 (1952), dismissing as improvidently granted, a writ of certiorari to review affirmance of a temporary injunction.

II.

THE STATE COURTS HAVE THE FINAL SAY AS TO STATE PUBLIC POLICY AND TO THE MEANING OF RIGHT TO WORK PROVISIONS IN STATE CONSTITUTIONS.

The construction of state constitutional and statutory provisions is left to the states in the first instance, if

the state has authority to enact such law. See *Williams v. Oklahoma*, 358 U.S. 576, rehearing denied 359 U.S. 956 (1959).

Although the Petitioners have attempted to say in various and sundry fallacious ways that the Florida court does not have the authority to construe or interpret the Florida Right-to-Work constitutional safeguard, this Court has specifically directed that the Federal courts should not attempt to pass on the merits of any controversy involving such specific provision *until* the Florida courts had construed it. In *American Federation of Labor v. Watson* 327 U.S. 582 (1946), this Court discussed the Right-to-Work provision (Section 12 of the Declaration of Rights of the Florida Constitution) in a matter wherein a three-judge district court had passed on the merits of a controversy seeking to enjoin the enforcement of the constitutional safeguard.[1]

This Court held, inter alia, in reversing and remanding the cause with directions to retain the bill, pending the determination of state court proceedings, that:

> ". . . The merits involve substantial constitutional issues concerning the meaning of a new provision of the Florida constitution which, so far as we are advised, has never been construed

[1] That portion of Section 12 of the Declaration of Rights of the Florida Constitution which is in issue reads as follows:

> ". . . The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union, or labor organization; provided, that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer."

by the *Florida courts. Those courts have the final say as to its meaning.* (327 U.S. at 767) (emphasis supplied)

* * *

" . . . A decision today on the constitutionality of this Florida law would be based on a preliminary guess concerning its meaning, not on an authoritative construction of it. We have already noted that this law may be so construed as to eliminate any conflict alleged to exist between it and the National Labor Relations Board." (327 U.S. at 598)

Based on the above direction of the United States Supreme Court and the provisions of Section 14(b) of the National Labor Relations Act, and its own inherent powers, the authority of the Florida Supreme Court to interpret and construe its own constitutional provision as invalidating the Agency Shop cannot be seriously or arguably contested.

Out of seven Supreme Court justices, two dissented to the majority opinion, with Justice O'Connell dissenting as to the appellate jurisdiction, but concurring on the merits, and Justice Thomas dissenting due to lack of jurisdiction. The Petitioners have adroitly sought to raise in their Petition through a footnote reference (Pet. p. 6) that the two dissenters did not state their reasons for dissenting and that they may have dissented because they may have agreed with the petitioners that the state courts have no jurisdiction to regulate the subject matter. Petitioners have apparently overlooked the copy of the letter

mailed to their counsel, Claude Pepper, dated May 10, 1962, from the Clerk of the Florida Supreme Court, advising them that the dissents referred to the jurisdiction of the court to consider and determine the appeal by reason of the provisions of Article V of the Florida Constitution as amended in 1956, restricting the jurisdiction of the Supreme Court.[4]

The electorate of Florida, in 1944, approved the Right to Work constitutional provision, believing that the Right to Work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Federal and State constitutions to secure. The right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase "pursuit of happiness" in the Declaration of Independence, which commenced with the fundamental proposition that "all men are created equal, that they are endowed by their Creator with certain inalienable rights; that among

[4]Under date of May 10, 1962, the Honorable Guyte P. McCord, Clerk of the Supreme Court of Florida, addressed a letter to Counsel for the Respondents, copy of which was mailed directly by the Clerk to the Claude Pepper Law Offices, reading as follows:

"I am in receipt of your letter of the 8th requesting that I call to the attention of Justices Thomas and O'Connell their dissents to the main opinion because of your belief that they would wish to clarify their dissents. These dissents refer to the jurisdiction of this Court to consider and determine the appeal by reason of the provisions of Article V of the Florida Constitution as amended in 1956, restricting the jurisdiction of the Supreme Court. While the majority of the Court joined in the opinion of Mr. Justice Hobson, it was the privilege of these two justices to dissent, not necessarily on account of the justice or injustice of the opinion of the Court, but because they do not believe the Court has jurisdiction to consider and determine the appeal under the restricted jurisdiction set out in Article V."

these are life, liberty and the pursuit of happiness". This right, the right to work, is a large ingredient in the civil liberty of the citizen.

The right to work is equivalent to the right to eat and the right to eat and provide food, clothing and shelter for his dependents is man's most dominant urge. In a free country like ours, such a right should not depend on one's race, color, the lodge, craft, church or other organization to which he belongs. Such a requirement is contrary to the spirit of our institutions, the basis on which our democracy was founded and every impulse of the forefathers who gave it existence. We can think of nothing more out of harmony with true Americanism. Membership in one's church, lodge, craft or union may be a means of enlarging spiritual, cultural, physical and financial assets, but to make one's bread depend on church or union membership or forced payment of money to a union as a condition of employment would be the worst species of anti-Americanism.

When the petitioning union, a local of the Retail Clerks International Association, AFL-CIO, one of the wealthiest unions in America, seeks to have this Court invoke judicial notice that "*poverty stricken local unions*" (Pet. p. 21) face enormous obstacles in achieving equality of bargaining power and effective collective bargaining, without compulsory payments to a union via the agency shop, one must wonder what happened to the traditional democratic principle of voluntarism. Who should decide whether or not an individual joins and supports a particular private organization? Should the union decide? Should management decide? Should the union agent and management get together and decide? Or should the individual de-

cide for himself? The people of Florida have decided, as did the Supreme Court of Florida, that they, as individuals, are not to be coerced or intimidated in the enjoyment of their legal rights, including the right of free and voluntary decision as to whether or not they will join or support a union.

The strained and tortured reasoning of the Petitioners that money must be exacted from non-union members using the device or "gimmick" of the Agency Shop in order to assist the union in financing collective bargaining is fallacious. The freedom of individual and voluntary choice and decision is paramount to the union's alleged financing needs all of which is not used for collective bargaining expenditures. Furthermore, the union has not shown the reasonableness of any fee sought to be exacted. The record is barren of any showing of alleged benefits obtained from the union that the Respondents could not and would not have obtained without the union. But those are issues that are not involved herein. The Petitioner is correct when it states that under federal labor law, it must represent all employees whether union or non-union. Yet federal labor law did not give the unions the power to tax non-union members in a Right-to-Work state. The Petitioner is trying to clothe itself with governmental power. The power to tax is the exclusive power of the sovereign government and not the power of any private organization, such as the Petitioner union. The Bill of Rights of the United States Constitution protects the civil rights and liberties of individuals from governmental abuses and arbitrary compulsions and the Declaration of Rights of the Florida Constitution, and specifically, Section 12 thereof, protects the right of individuals, such as

the Respondents, from the Agency Shop compulsory exaction.

As stated by the Florida appellate court (141 So.2d at pages 272, 273) (Pet. App. p. 5a):

> "This section clearly bestows on the workingman a right to join or not to join a labor union, as he sees fit, without jeopardizing his job. Inasmuch as the Constitution has granted this right, the Agency Shop clause is repugnant to the Constitution in that it requires the non-union employee to purchase from the labor union a right which the Constitution has given him. The Constitution grants a free choice in the matter of belonging to a labor union. The agency shop clause contained in the contract under consideration purports to acknowledge that right, but in fact, abrogates it by requiring the non-union worker to pay the union for the exercise of that right, or, in the alternative, to be discharged from his employment. Such an arrangement is palpably and totally inconsistent with the freedom of choice contemplated by our Declaration of Rights, Section 12."

An alarming, if believed, but basic misconception was made by Petitioners in their Petition when they asserted that "In labor relations, as in all other aspects of political life, the power of the purse strings is the power to control." (Pet. p. 21). We cannot "buy" such misconception, and the large growth of the voluntary labor movement in this country belies the statement. Unions have increased in numbers and in economic and political as well as financial power in the last several

years as voluntary organizations. They have no need to compel unwilling workers to join and pay them dues. It is also hardly debatable that a voluntary organization of workers united for self-help is inherently a much stronger organization than a union composed to a considerable extent of coerced unwilling workers.

And as stated by Mr. Justice Frankfurter in a concurring opinion in the "Right-to-Work" case, *A. F. of L. v. American Sash & Door Co.*, 335 U.S. 538, 551 (1949), in quoting Mr. Justice Brandeis:

> ". . . the ideal condition for a union is to be strong and stable, and yet to have in the trade outside its own ranks an appreciable number of men who are non-unionists. . . Such a nucleus of unorganized labor will check oppression by the unions as the unions check oppression by the employer."

III.

CONGRESSIONAL INTENTION IS CLEAR THAT THE STATES ARE FREE TO PURSUE THEIR OWN RESTRICTIVE POLICIES IN THE MATTER OF UNION-SECURITY AGREEMENTS AND THAT SECTION 14(B) FORESTALLS FEDERAL PRE-EMPTION.

Under Section 14(b) of the Labor Management Relations Act,[5] Congress yielded to the states the authority to ban union-security and union-shop agreements, saying:

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[5]National Labor Relations Act as Amended, 1947, 61 Stat. 151, 29 U.S.C. §164.

> "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

It is by virtue of this provision that states are able to enact right-to-work laws, which escape the condemnation of the federal courts under the Petitioners' federal pre-emption theories. This provision is paramount to Section 8 (a)(3) of the Act. And as stated by this Court in the recent labor-management case of *Charles Dowd Box Co. v. Courtney*, 368 U.S., 82 S.Ct. 519, 523-4, decided February, 1962:

> "We start with the premise that nothing in the concept of our federal system prevents state courts from enforcing rights created by federal law. Concurrent jurisdiction has been a common phenomenon in our judicial history, and exclusive federal court jurisdiction over cases arising under federal law has been the exception rather than the rule."

Petitioners have sought to rely on the Colorado case of *Bldg. Construction Trades Council v. American Builders*, 139 Colo. 236, 337 P.2d 953 (1959) as authority for their contention that Section 14(b) merely authorizes the states to declare, as a matter of federal law, that agreements requiring "membership" are unlawful and that the states do not have jurisdiction. However, petitioners

failed to point out that Colorado does not have a Right to Work law.[6]

The motive and purpose of Section 14(b) is plainly to make effective the Congressional intent and public policy that the states are free to enact their own right-to-work laws and to restrict all forms of compulsory unionism as an exception to the protective federal policy of Section 8 (a) (3). When Congress enacted the 1947 changes to the National Labor Relations Act, it was well aware that broadly drafted right-to-work laws already existed.[7] Had Congress wished to deprive the states of authority to proscribe all forms of union security protected by section 8(a)(3), it could have done so expressly. Instead, the House Conference Report declared that section 14(b) was intended to "assure that nothing in the act was to be construed as authorizing any closed shop, union shop, maintenance of membership, or other form of compulsory unionism agreement" in a right-to-work state.[8] Congress, assuredly, believed that individual-security was and is superior to union-security.

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[6]Interestingly enough, the Colorado court said (337 P.2d at 360): "Colorado does not have a 'right to work' law. An agreement requiring membership in a labor organization as a condition of employment is under certain circumstances permitted in this state. C.R.S. '53, 80-5-6. *Said Section 14(b) only applies where such an agreement could not be executed or applied under any circumstances within the state.*" (emphasis supplied)

[7]House Report No. 345 on H.R. 3020, 80th Cong. 1st Sess.; 1 Legis. Hist. of LMRA 324-5, 331, 335. House Report No. 345 referred to at least 12 states (Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Louisiana, Minnesota, Nebraska, North Dakota, South Dakota and Tennessee) having laws forbidding compulsory unionism.

[8]House Report No. 510 on H.R. 3020; 1 Legis. Hist. id. 564, see also 2 Legis. Hist. 1586.

Senator Taft, on the floor of the Senate, on June 5, 1947, summarized the new subsection (Section 14(b)) as making it perfectly clear that nothing in the act is to be construed as authorizing compulsory union membership agreements in States where the execution or enforcement of such agreements would be contrary to State law.[9] He went on to say that inasmuch as many States had enacted laws or adopted constitutional provisions to make all forms of compulsory unionism in such states illegal, it was not the intent to deprive the States of such power.

The Petitioners, despite the clear intent and purpose of Congress, argue that Florida (the first State to enact a Right to Work constitutional provision in 1944) can be deprived of the power to make all forms of compulsory unionism, including the Agency Shop device, unlawful and illegal. We submit that if these proponents of compulsory unionism and the Agency Shop device have confidence in their argument addressed to this Court, they should address their argument to the electorate of Florida and/or to Congress. The endorsement of the electorate would be a vindication that the mandate of this Court could never give. See *A. F. of L. v. American Sash Co.*, 335 U.S. 538 at p. 553.

Congress passed Section 14(b) with its legislative eyes wide open. Congress certainly did not sponge out the State's powers as to the matters contained therein or say that the State's powers were pre-empted. If this Court would disregard the Section 14(b) policy explicitly set forth by Congress, then Congressional intention would

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[9]See P. 6602 of Congressional Record June 5, 1947, and P. 6679 of June 6, 1947; see also Vol. 2 of Legis. Hist. of LMRA pp. 1542, 1596.

be frustrated and State power wiped out. Section 14(b) policy-curbing of union interference with the right to work is to be scrupulously observed. By refusing to legislate beyond that, Congress did not forbid the States from declaring, enforcing, passing and interpreting Right-to-Work laws and constitutional provisions.[10]

The Petitioners lay great stress upon the case of *Hill v. Florida*, 325 U.S. 538, 542-543, decided in 1945 prior to the passage of Section 14(b). The *Hill* case did not concern itself with the Right-to-Work law and insofar as any alleged effect in the instant case (where Congress has placed a stamp of approval on State Right-to-Work laws), the *Hill* case has been essentially distinguished by the recent *De Veau v. Braisted*, 363 U.S. 144 (1960) decision. In *De Veau*, it was held that a New York statute prohibiting ex-felons from holding union office was not pre-empted by Federal Labor law. The statute had been included in a compact approved by Congress. It was contended that the *Hill* decision governed the case but such contention was given short shrift when this Court found that it would offend reason to attribute to Congress a purpose to pre-empt the state regulation. An element, most persuasive in the *De Veau* case that was not present in the *Hill* case, was the congressional approval of the heart of the state legislative program explicitly brought to the Court's attention. (See 363 U.S. at 155).

The element, most persuasive and conclusive in the

[10] The problem of employees who receive alleged benefits of union representation but who are unwilling to give financial support to the union has received much attention by Congress (See S.Rep. No. 105, 80th Cong. 1st Sess., pp. 411-413; H.R. Rep. No. 510, 80th Cong., 1st Sess., pp. 546, 547) and by the courts. See *Radio Officers v. Labor Board*, 347 U. S. 17.

case at bar, is the legislative history and the *intent of Congress* as expressed in Section 14(b), to preserve to the States the right to enact, apply and enforce Right-to-Work laws. This intent cannot be overlooked, ignored or swept away by judicial fiat.

No Federal Pre-emption.

Petitioners' main argument, variously phrased, is that the state courts of Florida have no jurisdiction on the ground of the exclusive authority of the National Labor Relations Board (Pet. 16-19). Petitioners charge that the instant case requires the application of the doctrine of federal pre-emption "to preserve the exclusive jurisdiction of the Labor Board to administer federal law." (Pet. 19). This charge is incorrect. The substantive issue involved was heretofore presented and decided by this Court in *Algoma Plywood & Veneer Co.* v. *Wisconsin Employment Relations Bd.*, 336 U.S. 301 (1948).

At every stage of the proceedings in *Algoma Plywood*, the Union and the Company contested the jurisdiction of the State Employment Relations Board on the ground of the exclusive authority of the National Labor Relations Board. The case involved a form of compulsory unionism and union security, to-wit, a maintenance of membership clause. This Court ruled that union security arrangements were not protected by the National Labor Relations Act and that the states were therefore free to prohibit or restrict such arrangements. Since the operative facts in *Algoma* occurred prior to the 1947 Taft-Hartley amendment to the Act which introduced Section 14(b), the decision was that neither Section 7 nor Section 8(a)(3) of the Act, on which Petitioners here rely, in any way lim-

ited the right of a state to restrict or to prohibit any form of union security. In rejecting the precise argument advanced in *Algoma*, the same as advanced here, the Court stated (336 U.S. at 307):

> "It is argued therefore, that a State cannot forbid what §8(3) affirmatively permits. The short answer is that §8(3) merely disclaims a national policy hostile to the closed shop or other forms of union-security agreement . . ."

This Court viewed Section 14(b), added in 1947 by the Taft-Hartley amendment, as confirming the rights of the states to impose restrictions on union security arrangements beyond those set forth in the Act. The opinion states (336 U.S. at 313-314):

> "Other provisions of the Taft-Hartley Act make it even clearer than the National Labor Relations Act that the States are left free to pursue their own more restrictive policies in the matter of union-security agreements. Because §8(3) of the new Act forbids the closed shop and strictly regulates the conditions under which a union-shop agreement may be entered, §14(b) was included to forestall the inference that federal policy was to be exclusive . . ."

The dissenting opinion in *Algoma* expressly recognized that, even assuming the correctness of the pre-1947 administrative interpretation of Section 8(3) of the Act (rejected by the majority of seven justices but here pressed by the Petitioners), the addition of Section 14(b) by the 1947 Taft-Hartley amendment removed any ques-

tion as to the validity of state restrictions on union-security arrangements, stating (336 U.S. at 325):

> "... The Taft-Hartley Act expressly granted the states more leeway in regard to enforcement of their own policies as to contracts of the type here involved. 61 Stat. 136, 151, 29 U.S.C. §164. And the National Labor Relations Board has now construed the new federal act as precluding such contracts to the same extent that they are precluded by state law ..."

The Florida appellate courts have repeatedly recognized the doctrine of federal pre-emption and ceded jurisdiction to the National Labor Relations Board in cases where it was shown to be required.[11] However, the question of jurisdiction has been decided contrary to the pre-emption doctrine in three recent "Right to Work" cases in appellate courts in Arizona, Indiana and Kansas,[12] in addition to this Florida decision sought to be reviewed. The Florida court properly held, as did the other appellate courts, that the *Algoma* case has never been expressly overruled (as contended by Petitioners) and that *Algoma* has repeatedly been recognized and cited with apparent approval in later United States Supreme Court cases. See *Colgate-Palmolive-Peet Co.* v. *N. L. R. B.*, 338 U.S. 355

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[11] See *Amalgamated Clothing Workers, etc. v. La Vigne*, 111 So.2d 462 (1958); *Casteel v. United Brotherhood of Carpenters & Join.*, 125 So.2d 123 (1960); *North Dade Plumbing, Inc., v. Bowen*, 116 So.2d 790 (1960); *Scherer & Sons, Inc. v. International Ladies' G. Wkrs.*, 142 So.2d 290 (1962).

[12] *Sheet Metal Workers International Ass'n. v. Nichols* (1961) 89 Ariz. 187, 316 P.2d 204; *Meade Electric Company v. Hagberg* (1959) 129 Ind. App. 631, 159 N.E.2d 408; *Higgins v. Cardinal Manufacturing Company* (1961) 188 Kan. 11, 360 P.2d 456, certiorari denied (1961) 368 U.S. 829.

(1949); *Garner* v. *Teamsters C. & H. Union*, 346 U.S. 485 (1953); *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468, 477 (1955); *Guss* v. *Utah L. R. B.*, 353 U.S. 1, 10 (1957); *Local 24 of I. B. of T. C. W.* v. *Oliver*, 358 U.S. 283 (1959); *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236 (1959).

As late as 1959, in the *Oliver* case, in footnote 10, it was said (358 U.S. at 296):

> "In Algoma, state law was allowed to operate to restrict a provision of a collective bargaining contract only after it was found after an exhaustive examination of the legislative history of the Wagner Act that Congress intended to leave the special subject of the legality of maintenance of membership clauses up to the States through §8(3) of that Act, 49 State. 452. Questions of the nature that we consider today were expressly left open, 336 U.S. at 312."

As recently as October, 1961, Petitioner's identical contentions that the *Algoma* case cannot be relied on by the State Courts and that the Taft-Hartley act has preempted State jurisdiction, was presented to this Court in a labor organization's Petition for a Writ of Certiorari to the Supreme Court of Kansas involving a Right-to-Work case on all fours with the instant case. In *Higgins* v. *Cardinal Manufacturing Company*, 188 Kan. 11, 360 P.2d 456 (1961) cert. denied 368 U.S. 829, the Kansas Supreme Court found that an Agency Shop device was illegal and unlawful and in violation of the Kansas Right to Work constitutional provision. The Kansas court further found that Section 14(b) of the Taft-Hartley Act preserved the

jurisdiction of the states in matters involving state "Right-to-Work" provisions. This Court, after full and deliberate consideration, denied the Petition for a Writ of Certiorari. See *Gen'l. Drivers Automotive, etc., et al* v. *Higgins, et al*, 368 U.S. 829 (1961). Consequently, the question of the illegality of an "Agency Shop" in a Right-to-Work state and the pre-emption doctrine allegedly related thereto, has already been decided and determined by this Court and the decision of the Florida Supreme Court does not conflict with, but accords with national labor policy and the decisions of this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

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September 18, 1962

APPENDIX

IN THE SUPREME COURT OF FLORIDA
JULY TERM, A. D. 1962

MONDAY, AUGUST 13, 1962

SCHERMERHORN, et al.,

Appellants,

vs.

RETAIL CLERKS LOCAL 1625, et al.,

Appellees.

Appellees' motion to supplement the record to be certified to the United States Supreme Court is denied. The suggested additions to the record were not before this Court when the case was argued by counsel and considered and disposed of by this Court.

Pertinent statutes, in addition to those set forth in the brief are as follows:

Florida Statutes Annotated — Florida Rules of Civil Procedure, 1954.

Rule 1.8 GENERAL RULES OF PLEADING

"(a) *Forms of Pleadings.* Forms of action and technical forms for seeking relief and of pleas, pleadings or motions are abolished.

"(b) *Claims for Relief.* A pleading which sets forth a claim for relief, whether an original

claim, counter-claim, or cross-claim, must state a cause of action, and must contain allegations of fact sufficient to show the jurisdiction of the court. It shall set forth a short and plain statement of the ultimate facts on which the pleader relies, and if it informs the defendant of the nature of the cause against him, it shall be held sufficient. It must contain a demand for judgment or decree for the relief to which the pleader deems himself entitled. Relief in the alternative or of several different types may be demanded. Every complaint shall be considered to pray for general relief.

"(c) *The Answer.* In his answer a pleader shall state in short and plain terms his defenses to each claim asserted, and shall admit or deny the averments on which the adverse party relies. Should the defendant be without knowledge, he shall so state, and such statement shall operate as a denial. Denial shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part of an averment, he shall specify so much of it as is true and material, and shall deny the remainder. Unless the pleader intends in good faith to controvert all of the averments of the preceding pleading, he may make his denials as specific denials of designated averments, or he may generally deny all of the averments except such designated averments as he expressly admits; but, when he does so intend to controvert all of its averments, including averments of the grounds upon which

the Court's jurisdiction depends, he may do so by general denial."

Rule 1.11 DEFENSES

"(a) *When Presented.* A defendant shall serve his answer within twenty days after service of the summons and complaint upon him, or not later than the date fixed in a notice by publication, which date shall be not less than twenty-eight nor more than sixty days after the first publication of the notice. A party served with a pleading stating a cross-claim against him shall serve an answer thereto within twenty days after the service upon him. The plaintiff shall serve his reply to a counterclaim within twenty days after service of the counterclaim, or, if a reply is ordered by the court, within twenty days after service of the order, unless the order otherwise directs. The service of a motion under this rule (except a motion for judgment or decree on the pleadings) alters these periods of time as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within ten days after notice of the court's action; (2) if the court grants a motion for a more definite statement the responsive pleading shall be served within ten days after the service of the more definite statement.

"(b) *How Presented.* Every defense, in law or fact, to a claim for relief in any pleading,

whether a claim, counter-claim or cross-claim, shall be asserted in the responsive pleading thereto if one is required; except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a cause of action, (7) failure to join indispensable parties. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief."

Rule 3.8

When Cause Deemed at Issue.

"If at the expiration of 20 days from the service of the answer no counterclaim has been served or, if counter-claim has been served, then at the expiration of 20 days from the service of the reply thereto, the cause shall be deemed at issue. If, however, within such period of 20 days a motion permitted by these rules is served, the cause shall not be deemed at issue until the points of law so presented shall be ruled upon by the court."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 13

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL 1625, AFL-CIO, and WILLIAM TRAVIS, President of Retail Clerks International Association, Local 1625, AFL-CIO, *Petitioners,*

v.

ALBERTA SCHERMERHORN, LOIS DEVITA, JOYCE E. THURO, and LARRY STARK, *Respondents.*

On Petition for A Writ of Certiorari to the Supreme Court of Florida

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 368

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL 1625, AFL-CIO, and WILLIAM TRAVIS, President of Retail Clerks International Association, Local 1625, AFL-CIO, *Petitioners,*

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PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

I.

In the petition for certiorari, petitioners brought to the Court's attention the recent decision of the Sixth Circuit Court of Appeals in *General Motors Corp.* v. *National Labor Relations Board,* — F. 2nd —, 50 L.L.R.M. 2396, wherein the Sixth Circuit held that under Section 8(a)(3) of the National Labor Relations Act, as amended, an agency shop agreement is

unlawful. As we noted the Sixth Circuit's decision is in inescapable conflict with the decision of the Florida Supreme Court.

Since the filing of our petition for certiorari, the Solicitor General on behalf of the National Labor Relations Board has petitioned this Court for certiorari in the *General Motors* case. (*National Labor Relations Board* v. *General Motors Corp.*, No. 404, October term, 1962.) According to the Solicitor General's petition, the *General Motors* decision "appears to conflict in principle with recent State court decisions holding that State right-to-work laws, drafted only in terms of 'membership,' outlaw the agency shop." (Pet., p. 19, *National Labor Relations Board* v. *General Motors*, No. 404, October Term, 1962.) Similarly, the AFL-CIO has filed a brief in this Court as *amicus curiae* supporting the Solicitor General. In its brief the AFL-CIO also draws the Court's attention to the conflict between the decision of the Sixth Circuit and that of the Florida Supreme Court. The AFL-CIO urges the Court to consider the petition of the Solicitor General and the instant petition together because of the "complex interrelationship" of these cases. The AFL-CIO further urges the Court to grant certiorari in both cases. (AFL-CIO *amicus curiae* brief, pp. 19-22, *National Labor Relations Board* v. *General Motors Corp., supra.*)

Although our petition for certiorari discusses the *General Motors* case and its impact on the decision of the Florida Supreme Court, respondents make no reference to the *General Motors* case in their brief opposing certiorari. Respondents apparently recognize that there is a conflict between the Florida Supreme Court's decision and that of the Sixth Circuit, and that much

confusion has resulted therefrom. Review by this Court of both decisions is essential to resolve the conflict and provide parties in interstate commerce with a clear understanding of the law governing this critical issue.

Respondents similarly do not contest that the issue in this case is one of extraordinary importance to millions of workers in the nineteen right-to-work states. On the contrary, respondents' brief in opposition summarizes its position on the merits and, if anything, far exceeds petitioners' views of the magnitude of the case by asserting that the case raises questions which challenge "the basis on which our democracy was founded." (Brief in Opposition, p. 13.)

II.

Respondents rely upon this Court's decision in *American Federation of Labor* v. *Watson*, 327 U.S. 582 (1946), for the self-evident proposition that the "construction of state constitutional and statutory provisions is left to the states in the first instance" and that "the authority of the Florida Supreme Court to interpret and construe its own constitutional provision as invalidating the Agency Shop cannot be seriously or arguably contested." (Brief in Opposition, pp. 9-16.)

This argument begs the question. The issue herein is not whether the Florida Supreme Court has the authority to interpret its own constitutional provision, but whether the court has interpreted its constitution in conflict with the National Labor Relations Act and the supremacy clause of the federal constitution as applied to the parties in this proceeding. The court

expressly left this question open when it decided *Watson*, stating only that the Florida constitutional provision involved herein could not be said to conflict with federal law until its meaning and application had first been passed upon by the court of Florida and that the Florida law "may be so construed as to eliminate any conflict alleged to exist between it and the National Labor Relations Board." 327 U.S. at 598.

Now the Florida Supreme Court has provided an interpretation and application of the Florida law making the case ripe for review by this Court.

III.

Respondents rely upon cursory references to the legislative history to support Florida's right to ban "interstate 'agency shop' agreements." They point out that some members of Congress commented that Section 14(b) was intended to authorize the states to prohibit "compulsory unionism."

Respondents' reliance upon this nebulous legislative history is misplaced. In any event it does not contradict the express language of Section 14(b) of the Act which reserves to the state only the right to prohibit contracts requiring "membership in a labor organization as a condition of employment." The legislative history clearly evidences Congressional awareness of the "agency shop," and that Congress failed to deal with the "agency shop" directly despite this awareness. See Senator Taft's comments on the "agency shop" in the Senate Debate, 2 L.H. of L.M.R.A., 1422. On the other hand, respondents' references to the legislative history demonstrate the lack of any clear expression of Congressional intent to permit the states to ban "agency shop" agreements. Thus, respondents'

brief actually underlines the urgency for review by this Court of the decision below so as to clarify the meaning of Section 14(b) of the Act.

IV.

Respondents' unequivocal assertion that the "substantive issue involved [here] was heretofore presented and decided by this Court in *Algoma Plywood & Veneer Co.* v. *Wisconsin Employment Relations Board*, 336 U.S. 301 (1948)" withers under analysis. First, the *Algoma* case arose under the Wagner Act before Section 14(b) was even enacted. Second, *Algoma* involved a contract requiring the maintenance of "membership" in a labor organization, not an "agency shop" which does *not* require "membership." Third, *Algoma*, decided fourteen years ago, preceded this Court's development of the doctrine of federal preemption of interstate labor relations, of which the most recent expression is found in *Marine Engineers Benevolent Association* v. *Interlake Steamship Co.*, U.S. , 82 S. Ct. 1237 (1962). Fourth, respondents simply ignore this Court's *per curiam* reversal of the Wisconsin Supreme Court's decision in *Plankington Packing Co.* v. *Wisconsin Employment Relations Board*, 338 U.S. 953 (1950), on federal preemption grounds, involving facts virtually identical to those of *Algoma*.

While it is true that several right-to-work states, like Florida, regard the *Algoma* decision as dispositive of their authority to outlaw "agency shop" agreements in commerce, such reliance emphasizes the need for this Court to decide the question directly. In our opinion the *Algoma* decision is at best tangential to the issue herein, and in any event has been implicitly over-

ruled by *Plankington*. Continued, uncritical reliance on *Algoma* by the state courts as being dispositive of the issue is wholly unwarranted.

V.

Reciting generalities and ignoring realities, respondents assert that the judgment of the Florida Supreme Court is not final because it remanded the cause to the "trial court for proceedings not inconsistent with the opinion." (Brief in Opposition, pp. 7-8.) This is completely specious, for "nothing remains to be done but the mechanical entry of judgment by the trial court." *Pope* v. *Atlantic Coast Line R. Co.*, 345 U.S., 379, 382 (1953).

Respondents apparently believe that the mere remand to the trial court *ipso facto* means that the judgment below is not final. This Court for many years has rejected the notion that finality is governed by the language of remand on the face of the judgment itself. *Gospel Army* v. *City of Los Angeles*, 331 U.S. 543, 546-548 (1947).

What questions remain to be decided on remand in the trial court? According to respondents, the trial court has yet to "either enter or deny a permanent injunction in the instant case, and decide on an accounting or award damages." (Brief in Opposition p. 8.) The trial court *must* enter a permanent injunction. Any other action would not be consistent with the Florida Supreme Court's decision and judgment. Florida law holds trial courts to an inflexible standard of adherence to appellate court decisions. *Berger* v. *Leposky*, 103 So. 2d 628 (Fla. 1958). Because this is a simple action to enjoin the operation of a contract, the issues of damages and an accounting are negiligible

and *de minimus*, requiring only a perfunctory and routine judicial act. No element of discretion is involved. Moreover, this Court has said that in "accounting cases, that which still remains to to litigated can scarcely give rise to new federal questions. The policy against fragmentary review has therefore little bearing." *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 71-72 (1948).

In every legal and practical sense, the judgment of the court below is final, and this litigation has come to an end in the state courts. There are only two issues in this litigation: whether the "agency shop" clause on its face violates Florida's right-to-work law and whether Section 14(b) of the Taft-Hartley Act deprives the state courts of jurisdiction to proscribe this "agency shop" clause. The Florida Supreme Court has definitively resolved both of these issues against petitioners. Petitioners have no other defenses to this action. If this case is remanded to the trial court at this stage, there is no issue of fact or question of law remaining. The facts are all admitted and self-evident, for the contract itself is admitted and is in evidence. There are no other defenses which petitioners have to this action, for all of respondents' defenses were finally disposed of by the Florida Supreme Court. The decision of that court is now the law of the case. In short, nothing remains to be done in the trial court except the ministerial, mechanical entry of judgment against petitioners.

Pope v. *Atlantic Coast Line R. Co.*, 345 U.S. 379, 382 (1953), is the complete answer to respondents' finality contention. Even more recently, this Court rejected a finality contention in a case where, unlike here, the *only* issue decided by the state's highest court was

jurisdictional and where *every* issue of state substantive law was undecided. *Madruga* v. *Superior Court,* 346 U.S. 556 (1954). See also *Boyd* v. *Grand Trunk Western R. Co.,* 338 U.S. 263 (1949), and *Drivers Union* v. *Meadowmoor Co.,* 312 U.S. 287 (1941).

Unlike *Gospel Army* v. *Los Angeles,* 331 U.S. 543 (1947), where on remand by the state high court a new trial resulted and where new issues of fact and defenses of law could be raised, there will be no new trial here, and there is nothing left to try. *Berger* v. *Leposky,* 103 So. 2nd 628 (Fla. 1958). Unlike *Republic Natural Gas Co.* v. *Oklahoma,* 334 U.S. 62 (1948), on remand here there are no alternative possibilities for disposition on this case on state law grounds or possibilities for raising new federal questions.

This Court has said that the purpose of the final order rule under 28 U.S.C. § 1257 is to avoid fragmantary review. *Richfield Oil Corp.* v. *State Board of Equalization,* 329 U.S. 69 (1946). That purpose would be fulfillled by granting review to the petition here, for nothing substantive remains to be done below. If deprived of review, petitioners would be subjected to the needless expense and delay of a second and perfunctory series of appeals through the Florida courts, all as a matter of formality.

VI.

Respondents' assertion that the Statement in the petition contains "facts .... not contained in any Record presented to the Supreme Court of Florida or to this Court" is patently untrue. (Brief in Opposition, p. 3) Respondents do not point to a *single* fact which is even alleged to be outside the record here.

Moreover, every fact stated in the petition is specifically supported by one or more record references, and respondents do not challenge any of them in any respect.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 13

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL 1625, AFL-CIO, and WILLIAM TRAVIS, President of Retail Clerks International Association, Local 1625, AFL-CIO, *Petitioners*,

v.

ALBERTA SCHERMERHORN, LOIS DEVITA, JOYCE E. THUBO, and LARRY STARK, *Respondents*.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF FOR THE PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 368

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL 1625, AFL-CIO, and WILLIAM TRAVIS, President of Retail Clerks International Association, Local 1625, AFL-CIO, *Petitioners,*

v.

ALBERTA SCHERMERHORN, LOIS DEVITA, JOYCE E. THURO, and LARRY STARK, *Respondents.*

On Writ of Certiorari to the Supreme Court of Florida

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the Florida Circuit Court of Dade County is unofficially reported at 47 LRRM 2300 (R. 14). The opinion of the Florida Supreme Court is reported officially at 141 So. 2d 269 and unofficially at 50 LRRM 2055 (R. 19).

JURISDICTION

The jurisdiction of this Court rests on 28 U.S.C. § 1257(3). The judgment of the Florida Supreme Court was entered on April 25, 1962 (R. 19). On July 19, 1962, Mr. Justice Black extended the time for filing a petition for certiorari to and including August 24, 1962 (R. 33). The petition for certiorari was granted on November 19, 1962 (R. 33).

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*.

QUESTIONS PRESENTED

1. Does § 14(b) of the Labor Act authorize the States to prohibit a contract clause under which employees, who are not required to be and who choose not to be "members" of the union, must pay service fees for the sole purpose of defraying collective bargaining costs for services which the union as exclusive bargaining agent has a statutory duty to provide?

2. Do the courts of Florida have primary jurisdiction to regulate the service fee clause of the contract and conduct at bar which are "arguably" protected or prohibited by the Labor Act?

STATEMENT

1. The Parties and the Contract

Under the terms of a collective bargaining contract, petitioner Retail Clerks, Local 1625 (hereinafter called "the union"), has been recognized as the sole and exclusive bargaining agent for a unit consisting of "all employees" in retail food stores operated by Food

Fair Stores, Inc., in five Southern Florida counties,[1] a bargaining unit of some 1900 employees (R. 2). Food Fair operates a sizeable chain of supermarkets in interstate commerce (R. 26, n. 4).[2]

The contract was executed on October 14, 1960, effective until April 15, 1963, and it establishes a number of beneficial working conditions for all employees in the bargaining unit. Typical of these are protection against discharge except for "just cause",[3] paid vacations and holidays,[4] pregnancy leaves of absence,[5] maximum hours limitations and reporting pay,[6] noncontributory life and hospitalization insurance,[7] seniority protections,[8] paid time off to vote, serve on juries and attend family funerals,[9] separation pay,[10] beneficial wage rates, annual increases,[11] and many others. All of these contract rights are subject to protection

---

[1] R. 13 [Art. 2, p. 1].

[2] The National Labor Relations Board has regularly asserted jurisdiction over this employer. Florida Wholesale Grocery Co., d/b/a Food Fair Stores, 83 NLRB 852 (1949), Food Fair Stores, Inc., 120 NLRB 497 (1958); Food Fair Stores, Inc., 138 NLRB No. 2, 50 LRRM 1512 (1962); NLRB v. Food Fair Stores, Inc., 307 F. 2d 3 (3rd Cir. 1962).

[3] R. 13 [Art. 4, p. 2].

[4] R. 13 [Art. 11 and 12, pp. 7-10].

[5] R. 13 [Art. 14, pp. 10-11].

[6] R. 13 [Art. 17, pp. 13-14].

[7] R. 13 [Art. 20, pp. 16-17].

[8] R. 13 [Art. 21, pp. 17-19].

[9] R. 13 [Art. 34, pp. 22-23].

[10] R. 13 [Art. 35, p. 23].

[11] R. 13 [Art. 43, pp. 26-32].

and enforcement under the contract's "Grievance and Arbitration Procedure."[12]

As exclusive bargaining agent, the union has assumed a number of duties under the contract on behalf of all bargaining unit employees, including the duty of administering the grievance and arbitration machinery. Under the arbitration clause, for example, the union has assumed these financial commitments (R. 13 [Art. 7, Sec. 2, p. 4]):

> "The expense incurred in the Arbitration proceedings such as hearing room, stenographer, transcript for each party and the Arbitrator's fees shall be divided equally between the Union and the Employer."

In addition to the panoply of benefits outlined above, Article 19 of this contract contains two sections which deal generally with methods of financing collective bargaining activities (R. 13 [Art. 19, pp. 14-16]). Under Article 19, Section 1, the employer agrees to "deduct initiation fees and dues . . . from the pay of employees who are *members* of the Union"; this is a conventional "check-off" provision. Article 19, Section 2, is the service fee clause which provides as follows (R. 13 [Art. 19, Sec. 2, p. 16]):

> " 'Employees shall have the right to voluntarily join or refrain from joining the Union. Employees who choose not to join the Union, however, and who are covered by the terms of this contract shall be required to pay as a condition of employment, an initial service fee and monthly service fees to the Union for the purpose of aiding the Union in defraying costs in connection with its legal obliga-

[12] R. 13 [Art. 6, pp. 3-4].

tions and responsibilities as the exclusive bargaining agent of the employees in the appropriate bargaining unit The aforesaid fees shall be payable on or before the first day of each month, and such sums shall in no case exceed the initiation fees and the membership dues paid by those who voluntarily choose to join the Union. Other than the payment of these service fees, those employees who do not choose to join the Union shall be under no further financial obligations or requirments of any kind to the Union.' It shall also be a condition of employment that all employees covered by this Agreement shall on the 30th day following the beginning of such employment or the effective date of this agreement, whichever is later, pay established initial and monthly service fees as shown above."

2. Proceedings in the Trial Court

In November of 1960, four bargaining unit employees (respondents herein) instituted an action in the Circuit Court of Dade County, Florida, seeking injunctive relief against the enforcement of Section 2 of Article 19, the service fee provision (R. 5-6). Plaintiffs also demanded damages and an accounting for "any initial service fees or monthly service fees [received] from plaintiffs or other non-Union employees" (R. 7).

Plaintiffs described themselves as employees who "are not and do not want to be members of the Union," who "do not want to participate in any Agency Shop relationship," and who "do not want to pay the defendant Union any dues or service fees or initiation fees" (R. 5).

The legal predicate of the complaint was the contention that plaintiffs "have the right to work free

from restraints and coercion which would be imposed on them" by Article 19, Section 2 of the contract (R. 4). In particular plaintiffs contended that the service fee provisions of the contract violated Section 12 of the Declaration of Rights of the Florida Constitution[13] and Florida Statute 447.01[14] (R. 4). Plaintiffs specifically alleged that they had been threatened with discharge unless they complied with the contract and that they were, *"in effect, being blackmailed by the defendant Union to either pay money or lose their jobs"* (R. 5).

Attached to the complaint were two exhibits: a notice to employees containing a brief explanation of the service fee arrangement (Exhibit "A," R. 7-8) and a copy of the text of Article 19, Section 2, of the contract (Exhibit "B," R. 9).

Defendants promptly moved to dismiss the complaint raising both state and federal law defenses (R. 9-10). The two federal defenses were these: 1) the contract does not require "membership" in the union, and the federal Labor Act has preempted the state courts of jurisdiction to regulate the conduct of the parties under this agreement in interstate commerce; and 2) even if the contract in question violates Florida law, the state courts have no jurisdiction to regulate the contract, for a violation of Section 12 of the Declaration of Rights of the Florida Constitution would, under the circumstances of this case, constitute a federal unfair labor practice over which the National Labor Relations Board has exclusive jurisdiction (R. 10). Defendants also filed a "Response to Application for

[13] 25 Fla. Stat. Ann. § 12.

[14] Fla. Stat. Ann. 447.01.

Temporary Injunction" in which they questioned the "Court's jurisdiction of the subject matter" for the reasons stated in the Motion to Dismiss (R. 11).

In December, 1960, a hearing was held before the Circuit Court on plaintiffs' motion for a temporary injunction and defendants' motion to dismiss (R. 14). The court "heard testimony of the plaintiffs and their witnesses and received documentary evidence on behalf of the plaintiffs and defendants and the depositions of the individual plaintiffs taken on behalf of the defendants, and heard argument of counsel" (R. 15). The trial court decided the cause in defendants' favor. It wrote no opinion but simply recited in its order dismissing the complaint that (R. 15),

> ". . . the agency shop clause, Section 2, Article 19 of the contract between defendant Union and defendant Food Fair is not violative of the Florida 'right to work law' as contained in Section 12 of the Declaration of Rights of the Constitution of Florida and Chapter 447, Florida Statutes."

3. The Intermediate Appeal

Plaintiffs appealed the dismissal of their complaint to the District Court of Appeal (R. 20). In order to preserve the federal law defenses on which the trial court had not passed, the union cross-appealed and explicitly reiterated the same federal defenses (R. 16-17). The District Court of Appeal heard arguments and filed an opinion reversing the trial court (R. 20). Before its opinion became final, however, the District Court of Appeal granted the union's motion "to withdraw its opinion and to transfer the appeal" directly to the Florida Supreme Court (R. 17-18, 20-21), for the reason that an intervening decision of the Florida Supreme Court had suggested that the District Courts

of Appeal lack jurisdiction to review decisions "construing a controlling provision of the Florida constitution" (R. 18, 21). The Florida Supreme Court accepted the direct appeal reasoning that it "possess[ed] jurisdiction to determine this cause on direct appeal" (R. 22).

As a result of a peculiar procedural development in the District Court of Appeal, the only parts of the record which were before the Florida Supreme Court were some of the pleading and the contract itself. The defendants' verified Answer, the testimony of witnesses, documentary evidence and depositions of the parties, all of which were considered by the trial court (R. 14-15), were not before the Florida Supreme Court.[15] In view of the Florida Supreme Court's dis-

[15] The explanation of the absence of the whole record is this: plaintiffs designated only the formal pleadings (except for the verified Answer) and the contract to be certified to the District Court of Appeal, on the theory that the trial court had granted defendants' motion to dismiss, which allegedly tested only the sufficiency of the Complaint, and that all other parts of the record in the trial court were superfluous and not properly subject to consideration on appeal. Defendants, however, carefully designated every other part of the record to be certified to the District Court of Appeal in support of their cross appeal, so that the whole record would be certified on appeal.

Plaintiffs then formally moved the District Court of Appeal to strike defendants' designation of the additional parts of the record on appeal, and the District Court of Appeal granted this motion. When, thereafter, the District Court of Appeal vacated its opinion and transferred the appeal directly to the Florida Supreme Court, it was assumed by all parties that the whole record had been sent to the Florida Supreme Court for consideration and that the District Court of Appeal's order, striking other parts of the record from the appeal, had been automatically vacated along with its decision.

In the Florida Supreme Court, these additional parts of the record were the subject of extensive briefing by the defendants

position of the case on the merits, the absence of this additional evidence is unimportant here, however.

4. The Florida Supreme Court's Decision

The Florida Supreme Court reversed the trial court on the merits, two justices dissenting.[16] Its opinion is in two parts: the first part is its own brief analysis of the law; the second part is the text of the vacated opinion of the District Court of Appeal which it adopted in *haec verba* as its own (R. 25).

At the outset of its own consideration of the merits, the Florida Supreme Court observed that the plain-

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and were discussed by *all* parties in oral argument. Thus, petitioners continued to assume that the whole record was before the Florida Supreme Court.

It was not until after the Florida Supreme Court had rendered its decision and judgment that, in preparing their petition for a writ of certiorari to this Court, petitioners discovered that the trial court had never certified the whole record to the District Court of Appeal and, consequently, the whole record had not been sent to the Florida Supreme Court.

The bulk of the missing parts of the record proved, through testimonial and documentary evidence, that all employees in the bargaining unit—union members and non-members alike—have in fact enjoyed improvements in their wages, hours and working conditions as a direct and immediate result of the union's efforts and services on their behalf during the past ten years.

[16] Justices Thomas and O'Connell dissented without opinion saying only that "this court does not have jurisdiction to decide this case" (R. 31). Neither dissenting justice states whether his reference is to the issue of federal preemption, which was fully briefed and argued by the parties, or to the issue of whether the Florida Supreme Court should have reviewed this case on a direct appeal, an issue which was not briefed. After the decision was filed, counsel for respondents wrote a letter to the Clerk of the Florida Supreme Court suggesting the need for clarification. The Clerk answered that the dissenting justices were referring to the question of the direct appeal. Whether the Clerk was expressing his own opinion or was formally authorized to speak for the dissenting judges is not known.

tiffs were "non-union employees of Food Fair" who contend that the service fee contract in question "violated the 'right to work' provisions . . . of the Florida Constitution" (R. 20). This question, the court said, "has never been determined by an appellate court in this State," and it is a difficult question "because the right to work clause is not 'clear cut' when considered in connection with the facts presented in the instant case" (R. 21).

After quoting the text of Section 12 of the Declaration of Rights, the court used only a few words to invalidate the service fee clause of the contract as a matter of state law (R. 23):

> ". . . the agency shop clause is repugnant to the Constitution in that it requires the non-union employee to purchase from the labor union a right which the Constitution has given him. The Constitution grants a free choice in the matter of belonging to a labor union. The agency shop clause contained in the contract under consideration purports to acknowledge that right, but in fact abrogates it by requiring the non-union worker to pay the union for the exercise of that right or, in the alternative, to be discharged from his employment. Such an arrangement is palpably and totally inconsistent with the freedom of choice contemplated by our Declaration of Rights, Section 12."

Turning to the union's contentions that the state courts have no jurisdiction under § 14(b) of the federal Act to proscribe a true service fee contract which does not require "membership" in the union, the court below similarly disposed of this problem in just a few words (R. 24):

> "It is true that Section 14(b) specifically deals only with "agreements requiring *membership* in a

labor organization as a condition of employment . . .' However, it is not to be presumed that Congress would preserve to the states the field of right-to-work legislation, while, at the same time, intending that unions and management could, by the use of subterfuge of an agency shop clause, circumvent and, in effect, nullify a paramount provision of the organic law of any of the several states." (Emphasis in original text.)

The opinion of the District Court of Appeal, which the state supreme court adopted as its own opinion, similarly dealt with the problem of federal preemption of state court jurisdiction quite briefly. It says that this Court's decision in *Algoma Plywood & Veneer Co.* v. *Wisconsin Employment Relations Board*, 336 U.S. 301 (1949), "sanctioned state regulation of union security agreements impinging on state right to work laws"[17] and has "not been overruled in that respect by the subsequent decisions of the United States Supreme Court dealing with this question of preemption" (R. 26). Expressing its views as to the meaning of § 14(b), the District Court of Appeal said (R. 27):

> ". . . § 14(b) of the Federal Act . . . specifically authorizes and recognizes the validity of right to work laws of the several states."

Having decided that § 14(b) was intended by the federal Congress generally to sanction the operation of right-to-work laws, the court below reasoned that Florida's right-to-work law protects the right to work free

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[17] The Algoma case did not involve what is generally known as a "right to work" law, but involved a statute requiring a two-thirds vote as a prerequisite to entering a union shop or maintenance of membership contract.

from *any* "abridgement." This interpretation of the Florida law is expressed as follows (R. 29):

> "Under § 12 of the Declaration of Rights of Florida what is prohibited is the denial or *abridgement* of one's right to work 'on account of membership or non-membership in any labor union, or labor organization.' When, because of his non-membership, an employee is required to pay labor union dues, or sums equal to the dues, as a condition of employment or continued employment, his right to work is 'abridged.'
>
> "Anything which imposes a charge or expense upon the free exercise of a right, abridges it in the sense of curtailing or lessening the use of or enjoyment of that right. . . .
>
> * * *
>
> "The natural and reasonable interpretation of the Florida constitutional amendment, which prohibits compulsory membership in a labor organization . . . is that it necessarily forbids forcing a non-member to pay union initiation fees, dues or assessments or equivalent amounts as a condition of employment or continued employment. A contrary construction of the right to work law would leave it little or no useful purpose to serve."

Thereafter, the union sought review in this Court, pending which the Florida Supreme Court has stayed its mandate.

SUMMARY OF ARGUMENT

I. The decision below is plainly inconsistent with this Court's decisions that state courts have no jurisdiction to regulate activities which are "arguably" subject to the primary jurisdiction of the National Labor Relations Board. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 245 (1959). The La-

bor Board, not the state courts, must decide in the first instance whether conduct is protected, prohibited or unregulated by the federal Act, and the Labor Board must determine in the first instance the outer limits and scope of §.14(b) in relationship to the other provisions of the Act which it administers.

The instant contract does not require "membership" in a union as a condition of employment; it requires only that non-member employees pay a ratable share of the costs of collective bargaining. Whether such a contract is permitted, prohibited or entirely unregulated by federal law in a right-to-work state is a question for the Board. Section 14(b) does not confer power on the state courts to determine their own jurisdiction to regulate interstate labor relations. *Local 438, Construction Laborers* v. *Curry*, 31 U.S. L. Week 4143 (U.S. Jan. 21, 1963); *Electrical Workers* v. *Farnsworth & Chambers Co.*, 353 U.S. 969 (1957) (memorandum).

2. The concept of "membership in a labor organization," as used in § 14(b), other sections of the Taft-Hartley Act, and in other federal statutes, embraces the rights and duties of one who belongs to a private organization and is governed by its rules. "Membership" was used in the conventional sense in § 14(b) and does not include the mere payment of service fees to a labor organization.

While non-member employees under the instant contract are required to pay fees to the union, these fees differ in *purpose*, *use* and *amount* from the dues and fees paid by members of the union. The non-member enjoys none of the legally enforceable rights of union members, nor is he subject to any of the duties and re-

sponsibilities of union members: he has a special and quite limited relationship to the union. The Florida court's conclusion that such a narrow relationship constitutes a "subterfuge" to compel "membership" is based on a grave misunderstanding of the membership concept, the requirements of this contract, and the authority granted to the States by § 14(b).

3. The legal and moral basis for requiring a service fee of non-members is that the union, as exclusive bargaining agent for *all* employees in the unit, is under an enforceable duty to represent non-member employees equally and fairly. *Steele* v. *Louisville & Nashville R. Co.*, 323 U.S. 192 (1944); *Syres* v. *Oil Workers*, 350 U.S. 892 (1955) (memorandum); *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953). This duty necessarily requires the union to expend its assets for the benefit of non-members.

Nothing in the policy of the Act denies a union the right to negotiate an agreement providing that non-members must assist in financing collective bargaining functions, nor is there any principle of American law which requires a private organization to confer a costly and valuable benefit on a third party but which deprives the organization of any right to charge for its services.

4. The legislative history of § 14(b) reveals that Congress chose its words carefully and that it was only compulsory "membership" that Congress intended to permit the States to prohibit, nothing more. In committee reports and in debates, Congress manifested its intention to permit the States to proscribe only the "closed shop" and the "union shop." Congress evidently believed that the States should have the limited

power to regulate interstate labor relations only to this extent.

There is not a scintilla of evidence that § 14(b) was intended to authorize the States to engage in detailed regulation of the substantive terms of collective bargaining agreements, unrelated to compulsory membership.

5. The argument that the States have power to *prohibit* service fee contracts under § 14(b), because § 8(a)(3) *permits* only support money contracts under federal law, is specious. Section 8(a)(3) clearly authorizes compulsory "membership" contracts, for this is the plain language of the statute. *Union Starch & Refining Co.* v. *Labor Board*, 186 F. 2d 1008 (7th Cir. 1951), cert. denied 342 U.S. 815, a leading case interpreting § 8(a)(3), if anything, confirms the view that § 8(a)(3) permits the execution of compulsory membership agreements.

6. The companion case of *Labor Board* v. *General Motors Corp.*, No. 404, is factually quite different from the instant case. It should be reversed because it is based on a misreading of the policies of § 8(a)(3), which set forth the "permissive limits" of union security contracts under federal law. Section 14(b), on the other hand, is not a statement of the "permissive limits" of state power to regulate the substantive terms of interstate labor relations; it is a single, narrow exception to the comprehensive federal scheme of regulation which should be narrowly interpreted. See, *e.g.*, *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951); *A. H. Phillips* v. *Walling*, 324 U.S. 490, 493 (1945); *Spokane & Inland R. Co.* v. *United States*, 241 U.S. 344, 350 (1916).

7. The reliance of the court below on *Algoma Plywood & Veneer Co.* v. *Wisconsin E. R. B.*, 336 U.S. 301 (1949), is misplaced. In *Algoma* the Court held only that a state had power under the Wagner Act to remedy the discharge of an employee for his failure to maintain "membership" in a union. Later cases confirm that *Algoma* does not support the exercise of state court jurisdiction under § 14(b) to regulate conduct which is arguably within the regulatory power of the Labor Board and which might conflict with other substantive provisions of the Labor Act. *Construction Laborers* v. *Curry*, 31 U.S. L. Week 4143 (U.S. Jan. 21, 1963); *Electrical Workers* v. *Farnsworth & Chambers*, 353 U.S. 969 (1957) (memorandum).

ARGUMENT

I. CONGRESS' COMPREHENSIVE REGULATION OF LABOR RELATIONS IN COMMERCE DEPRIVES THE STATE COURTS OF JURISDICTION TO REGULATE THIS CONTRACT AND THE PARTIES' CONDUCT IN THE FIRST INSTANCE, FOR THEY ARE "ARGUABLY" PROTECTED OR PROHIBITED BY THE FEDERAL ACT.

By its enactment of the National Labor Relations Act with amendments, 29 USC § 150 *et seq.*, Congress has established a "comprehensive regulation of industrial relations" which has become "an integral part of our economic life." *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 239 (1959). Pursuant to Congress' scheme, this Court has repeatedly held that state courts have jurisdiction neither to impede the exercise of rights conferred by federal law nor to regulate acts prohibited by federal law. In a clear statement of this principle, the Court has said, *id.* at 244:

> "When it is clear or may fairly be assumed that the activities which a state purports to regulate

> are protected by § 7 . . . or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law."

The central question in this case is whether § 14(b) of the Labor Act creates a broad exception to Congress' plan of "comprehensive regulation" which authorizes the Florida courts to prohibit the instant contract and the conduct of the parties acting under the contract. As will be shown, this contract in no respect requires "membership" in a labor organization; it merely requires bargaining unit employees, who choose *not* to become members of the union, which is their exclusive bargaining agent, to pay reasonable service fees for those collective bargaining services which they receive and which the union is legally bound to provide them. For this reason the contract and the parties' conduct pursuant thereto are "arguably" protected by § 7 of the Act, and "the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board." *Id.* at 245.

This is not the first but the fourth case to reach this Court in which state courts have sought to regulate activity "arguably" within the regulatory power of the Labor Board on the asserted ground that § 14(b) of the Act creates a broad exception to the uniform federal law. In each case this Court has held that § 14(b) does not confer plenary jurisdiction on the state courts to apply right-to-work laws in a fashion which constitutes *de facto* state regulation of such

activities. In each of these cases the state courts had ruled, as has the Florida court here, that the parties' conduct was for the object of compelling "membership" in a labor union in violation of state right-to-work laws, and in each case this Court reversed on grounds of federal preemption. *Local 438, Construction Laborers* v. *Curry*, 31 U.S. L. Week 4143 (U.S. Jan. 21, 1963); *DeVries* v. *Baumgartner's Electric Construction Co.*, 359 U.S. 498 (1959) (memorandum) *Electrical Workers* v. *Farnsworth & Chambers Co.*, 353 U.S. 969 (1957) (memorandum). In the *Curry* case, *supra*, the Court held, 31 U.S. L. Week at 4144:

> "Nor is the jurisdiction of the Georgia courts sustainable, as respondents urge, by reason of the Georgia right-to-work law and by § 14(b) of the National Labor Relations Board . . . . This precise contention has been previously considered and rejected by this Court. Local Union 429 v. Farnsworth and Chambers Co. 359 US 969, reversing 201 Tenn. . . . ., 299 S.W.2d 8."

The Labor Board has not had occasion to pass on the validity of the instant contract or the parties' conduct. While we believe that this contract is "arguably" protected by § 7 of the Labor Act, the Board alone can make this determination in the first instance. On the other hand, if this Court should affirm the decision of the Sixth Circuit in the companion case of *Labor Board* v. *General Motors Corp.*, No. 404, which holds that the service fee contract there violates § 8(a)(3) of the Act, then it would be arguable *a fortiori* that the instant contract is prohibited by the Act. While it is not necessary for this Court to decide whether a contract which violates a valid state law within the scope of § 14(b) might constitute an unfair labor prac-

tice under the Labor Act, it has been suggested that such is the intention of Congress. *Building Construction Trades Council* v. *American Builders*, 139 Colo. 236, 337 P. 2d 953 (1959). *Cf. United States* v. *Sharpnack*, 355 U.S. 286 (1958).

As the Court said in *Garmon, supra*, in "the absence of the Board's clear determination that an activity is neither protected nor prohibited," state power must yield, for it "is essential to the administration of the Act that these determinations be left in the first instance" to the Board. 359 U.S. at 244-246. The very fact that the Labor Board asserted jurisdiction over the *General Motors* case, which deals with a service fee contract under a right-to-work statute in Indiana, clearly confirms that the contract and conduct of the parties here are "arguably" subject to the Board's jurisdiction.

Respondents could have filed § 8(a)(3) unfair labor practice charges against petitioners with the National Labor Relations Board alleging, as they specifically alleged in their complaint, that they have been threatened with discharge unless they comply with this contract (R. 5). On the basis of such charges, the Board could have determined whether the contract in question is protected, prohibited or entirely unregulated by the Act. If the Board had determined as a matter of federal law that the contract is unregulated by §§ 7 and 8, respondents could then have invoked the jurisdiction of the state courts. *Cf. Plankington Packing Co.* v. *Wisconsin Employment Relations Board*, 338 U.S. 953 (1950). In considering whether the contract and the conduct of the parties in this case are protected, prohibited or unregulated by the federal Labor Act, the Board must consider the scope of § 14(b) as

it may affect the Board's administration of other provisions of the Act.

In determining the relationship of § 14(b) to other provisions of the Act, the Board may look to state law. This does not mean that the Board would interpret state law, only that the Board would use the lawful prohibitions of state law as a factor in determining whether an activity is protected by the federal law. The Board has used state law as a guidline to the administration of federal law for many years. See, *e.g.*, *Giant Food Shopping Center, Inc.*, 77 N.L.R.B. 791 (1948), where the Board interpreted § 14(b) in relationship with former § 9(e)(1) of the Act, which provided for so-called union shop authorization elections. In *Giant Food* the Board looked to the provisions of Virginia law for the purpose of deciding whether a union shop election should be conducted in the face of Virginia's right-to-work statute. The Board did not interpret the state statute; it merely interpreted § 14(b), an integral part of the federal Act, as a limiting factor in the Board's administration of former § 9(e)(1). This is precisely the problem which the Board alone must resolve in the instant case, *viz.*, whether § 14(b), in relationship to other provisions of the Act, allows the States to strip the service fee contract of the protection of the Act.

The Board must have primary jurisdiction to determine the limit and scope of § 14(b) in this case to assure the "uniform application of [Congress'] substantive rules to avoid . . . diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies." *Garner* v. *Teamsters Union*, 346 U.S. 485, 490 (1953). Unless the States defer to the primary jurisdiction of the Board

to determine the outer limits of § 14(b), the States would be free to decide their own jurisdiction and power in these matters with intolerable consequence for the administration of the federal Act.

The Florida Supreme Court, deciding its own jurisdiction under § 14(b), has construed Congress' purpose as approving the unfettered operation and application of state "right to work" laws in interstate commerce, despite the words used in § 14(b) and the legislative history showing that Congress intended only to allow the states to enact anti-closed shop and anti-union shop statutes. Thus the Florida court said (R. 24):

> "We hold, as did the Supreme Court of Kansas in the case of Higgins v. Cardinal Manufacturing Company, 188 Kan. 11, 360 P. 2d 456, that *Section 14(b) . . . preserves the jurisdiction of the states in matters involving state 'right-to-work' provisions.*" (Emphasis added.)

And, further, the Florida court held (R. 27):

> "This exception from the federal pre-emption doctrine seems an obvious one brought about by § 14(b) of the Federal Act, which *specifically authorizes and recognizes the validity of right to work laws of the several states.*" (Emphasis added.)

The Florida court's interpretation of § 14(b) to permit it to decide its own power and jurisdiction has been adopted by several other States to reach results which are patently inconsistent with § 14(b) and with the administration of the whole Labor Act.

South Carolina and Arkansas, for example, have construed their right-to-work laws as prohibiting exclusive, non-discriminatory hiring hall arrange-

ments. *Brabham* v. *Miller Electric Co.*, 237 S.C. 540, 118 S.E. 2d 167 (1961); *Kaiser* v. *Price-Fewell, Inc.*, 235 Ark. 295, 359 S.W. 2d 449 (1962), cert. denied 31 U.S. L. Week 3217 (U.S. 1963).

South Dakota, by its Attorney General, and Louisiana by its supreme court, have gone so far as to hold that it is violative of their right-to-work laws for a union to enter into an exclusive bargaining contract with an employer. *So. Dakota Attorney General Op.*, 43 L.R.R.M. 73 (1948); *Piegts* v. *Meat Cutters*, 228 La. 131, 81 So. 2d 835 (1955). The Florida supreme court cited and quoted from the *Piegts* case with approval (R. 29-30) for the proposition that the Florida right-to-work law, like the Louisiana law, prohibits any "abridgement" of the right-to-work—regardless (not just "because of") of membership or non-membership in a labor organization.

The Supreme Court of Louisiana in *Piegts* interpreted its right-to-work law, which is almost identical to the Florida law, to prohibit a union's serving as the exclusive bargaining agent in the State of Louisiana. The Louisiana court said, 228 La. at 139:

> "Would a non-union man's rights be diminished, reduced, curtailed, or shortened if a union acted as his agent? We answer that question in the affirmative.
>
> "There are instances where the union demands higher hourly wages and shorter hours. In order to be gainfully employed to support his family, a non-union man might be willing to make concessions. Liberty of contract is the non-union man's prerogative."

This result under Louisiana's law, approved by the Florida court, is profoundly inconsistent not only with

§14(b) but also with § 9(a) of the Labor Act, which provides that "representatives designated . . . for the purposes of collective bargaining by the majority of the employees in a unit . . . shall be the *exclusive representatives of all employees* in such unit for the purpose of collective bargaining . . ."

As we read the Florida court's decision, it goes far beyond the prohibition of the service fee arrangement in this contract, for it would similarly prohibit *any* collectively bargained arrangement which requires non-member employees to assist financing collective bargaining functions in any respect. It would assuredly prohibit an exclusive, non-discriminatory hiring hall arrangement requiring the payment of a reasonable fee, however lawful the arrangement under federal law. See *H. John Homan Co.*, 137 N.L.R.B. No. 118 (1962). It would prohibit an arrangement requiring all bargaining unit employees to contribute to a fund to finance the cost of arbitration cases alone. It might also prohibit required contributions to a union-employer administered pension or welfare fund.[6] None of these common contract clauses has anything to do with "membership" in a labor union, and they are all typical products of free collective bargaining.

For these reasons, Florida's regulation of the contract and conduct of the parties must give way to the primary jurisdiction of the Board, for state court assertion of jurisdiction over this subject matter is an impermissible interference with Congress' plan for a "centralized administration of specially designed procedures . . . necessary to obtain uniform application of its substantive rules." *Garner* v. *Teamsters Union*, 346 U.S. 485, 490 (1953); *San Diego Building*

Trades Council v. *Garmon*, 359 U.S. 236 (1959); *Marine Engineers Beneficial Association* v. *Interlake S. S. Co.*, 370 U.S. 173 (1962).

II. SECTION 14(b) AUTHORIZES THE STATES TO PROHIBIT ONLY CONTRACTS REQUIRING "MEMBERSHIP IN A LABOR ORGANIZATION."

Section 14(b) authorizes the States to proscribe only the "execution or application of agreements requiring *membership* in a labor organization as a condition of employment" (emphasis added). The contract in question does not require "membership in a labor organization." On the contrary, it expressly disclaims any such requirement by providing that "Employees shall have the right to voluntarily join or refrain from joining the Union" (R. 9). Because the instant contract does not compel "membership," it may properly be concluded that its operation is beyond state regulatory power under § 14(b).

Petitioners do not contend that their contract is immune from state regulation solely because "membership" is not required of employees in *haec verba*, for we concede that the States might have power to proscribe a contract which patently requires "membership" through an obvious subterfuge intended to evade state law. By parity of reasoning, however, Florida cannot justify its prohibition of a true service fee contract under § 14(b) merely by asserting that such an arrangement requires "membership," regardless of the language and effect of the contract's terms.

The substantive problems remain: 1. What does "membership" mean in § 14(b)?; and 2. Is the service fee requirement of the instant contract in reality a requirement of "membership"? We shall deal with these questions *seriatim*.

A. The Term "Membership" Is Used in Its Conventional Meaning in Section 14(b).

The Labor Act does not define "membership in a labor organization," although it makes at least nineteen separate references to the terms "member" of and "membership" in a labor organization. These references throughout the Act reveal that Congress used these terms in the sense of satisfying the requirements for full participation in the legal activities of a private oganization governed by its own rules.[18]

In § 3(o) of the Labor-Management Reporting and Disclosure Act, 1959, a recent Congressional statute which not only extensively regulates relations between unions and their members but which also includes substantial amendments to the Taft-Hartley Act, Congress defined the term "member" of a labor organization in a manner wholly consistent with common English usuage and consistent with its usage in the Taft-Hartley Act. 29 U.S.C. § 402(o), 73 Stat. 521.

> "(o) 'Member' or 'member in good standing', when used in reference to a labor organization, includes any person who has fulfilled the require-

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[18] In the Labor Act as amended in 1947, these sections used the terms "members" of or "membership" in a labor organization: §§ 1, 7, 8(a)(3), 8(b)(1)(A), 8(b)(2), 8(b)(5), 9(b), 9(f)(4), 9(f)(5), (9(f)(6), 9(g), 14(a), 14(b), 301(b), 301(c), 302(c), and 402(3).

Section 9(f), for example, which was repealed in 1959, required labor organizations to file informational reports with the Secretary of Labor as a condition precedent to using the N.L.R.B.'s facilities. This information included the dues required to "remain members in good standing," "qualification for or restrictions on membership," and other matters relating to a union's internal affairs.

ments for membership in such organization, and who neither has voluntarily withdrawn from membership nor has been expelled or suspended from membership after appropriate proceedings consistent with lawful provisions of the constitution and bylaws of such organization."

This Court has dealt with the concept of "membership" in a labor organization many times in a variety of contexts, always in the sense of *belonging* to an organization whose members have rights as well as duties. See, e.g., *Adair* v. *United States*, 208 U.S. 161 (1908); *Loewe* v. *Lawlor*, 208 U.S. 274 (1908); *Hitchman Coal Co.* v. *Mitchell*, 245 U.S. 229 (1917); *Coppage* v. *Kansas*, 236 U.S. 1 (1914).

The rights and duties of membership in a union are governed by its constitution and by-laws, subject to amendment or repeal by its members. Almost universally the law of the States regards the relationship between a union and its members as a contractual arrangement which is judicially enforceable. *International Association of Machinists* v. *Gonzales*, 356 U.S. 617, 618-619 (1958) (*dictum*).

". . . . under California law membership in a labor union constitutes a contract between the member and the union, the terms of which are governed by the constitution and by-laws of the union, and that state law provides, through mandatory reinstatement and damages, a remedy for breach of such contract through wrongful expulsion. *This contractual conception of the relation between a member and his union widely prevails in this country* and has recently been adopted by the House of Lords in Bonsor v. Musicians' Union, [1956] A.C. 104." (Emphasis added.)

The Florida Supreme Court itself had held that a member's relations with his union are subject to "the rules of the organization by which he had agreed to be governed." *I.B.E.W., Local 349,* v. *Oikle,* 77 So. 2d 762, 765 (Fla. 1955), and that union members agree upon entering a union "to abide by its rules and decisions, or submit to disciplinary action, or expulsion." *Harper* v. *Hoecherl,* 153 Fla. 29, 32, 14 So. 2d 179, 180 (1943).

The member's interest in his membership is a valuable "property right" which is "entitled to be protected in its enjoyment." *Armant* v. *Cannon Employees Association,* 11 L.R.R.M. 752, 757 (Calif. Super. Ct. 1942). The state courts have for many years protected the rights of members against arbitrary expulsion and discipline,[19] to be a candidate for office and to vote in elections,[20] to inspect the union's books and records,[21] to preserve the autonomy of their local organization against arbitrary suspension,[22] and many other rights which are peculiarly those of membership.

Many common law rights of union members have recently been codified in the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 400, *et seq.* This statute, *inter alia,* protects the rights of "members" to free speech, to nominate candidates for office, to due process in any disciplinary proceeding,

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[19] *E.g.,* Sanders v. Iron Workers, 130 F. Supp. 253 (W.D. Ky. 1955); Miller v. Bldg. Service Employees, 211 N.Y. Supp. 2d 459 (N.Y. Sup. Ct. 1961).

[20] *E.g.,* DiBucci v. Ulrich, 189 N.Y. Supp. 2d 717 (N.Y. Sup. Ct. 1959).

[21] *E.g.,* Mooney v. Bartenders, 313 P. 2d 857 (Cal. 1957).

[22] *E.g.,* Schrank v. Brown, 80 N.Y. Supp. 2d 452 (N.Y. Sup. Ct. 1948).

to free elections, to local autonomy, and to hold their officers to a fiduciary standard.

Having deliberately used the words "membership in a labor organization," a phrase with meaning vested by decisions of many courts and many statutes, Congress did not intend to allow the States to prohibit any other kind of contract arrangement in interstate commerce. The words of § 14(b) should be given their normal and conventional meaning not only because § 14(b) constitutes an exception to the otherwise uniform and comprehensive federal regulation of interstate labor relations but also because the Taft-Hartley Act itself was "the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation," and the words used in the Act were, therefore, carefully chosen. *Local 1976, United Brotherhood of Carpenters* v. *Labor Board*, 357 U.S. 93, 99-100 (1958). The words of § 14(b) are plain words; as a limited exception to the otherwise uniform federal law, these words should be given their "normal and customary meaning." *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 388 (1951).

B. The "Service Fee" Clause in the Present Contract Does Not Require "Membership" in a Labor Organization, Nor Is It a Subterfuge to Escape the Operation of State Law.

If "membership" as used in § 14(b) embraces the rights and duties of one who has joined a union, does the contract clause here which Florida has prohibited require "membership" of employees as a condition of employment? Article 19, Section 2, of this contract

requires non-member employees "to pay as a condition of employment, an initial service fee and monthly service fees to the Union *for the purpose* of aiding the Union *in defraying costs in connection with its legal obligations and responsibilities as the exclusive bargaining agent* of the employees in the appropriate bargaining unit" (R. 9). Aside from the payment of service fees, the contract explicitly guarantees that "employees who do not choose to join the Union shall be under no further financial obligations or requirements of any kind to the union" (R. 9).

Without the benefit of any evidence as to the administration and operation of this contract, judging it only on its face, and without any analysis whatsoever of the meaning of the "membership" concept, the Florida Supreme Court simply concluded that this service fee arrangement was a "subterfuge" in the sense that it is really a requirement of "membership" stated in different terms but, nevertheless, intended to achieve the result of requiring membership in the union. The Florida court's unspoken analysis may have been based on this syllogism: members pay money to their union; the contract requires employees to pay money to the union; therefore, the contract requires "membership" in the union. The Florida court's analysis is as wrong as it is simple. Indeed, the Florida court appears to have said that any kind of enforced association with a union constitutes "membership" and may be prohibited under §14(b).

While members pay money to their union in the form of dues and non-members are required to pay money to the union in the form of service fees, this is the only fact common to the member and the non-member. Even this common fact is not without

profound distinctions in terms of the *purpose* to which such monies may be used by the union, the *amount* to be paid to the union, and the *manner* in which the amount is determined. In every other respect, the member of the union and the non-member stand in a totally different relationship to the union.

The member enjoys an enormous variety of legally enforceable rights: to participate in elections, meetings, benefit plans, to stand for office, to elect officers, to vote on contracts, to attend conventions, to be a shop steward, etc.[23] The member is also subject to a number of duties under the union's constitution and bylaws, which may be legally enforced: to attend meetings, to keep confidences, to respect picket lines, to pay special assessments, etc.[24] The non-member has no such rights and no such duties.

The payment of service fees to a membership organization, without becoming a member, is a common experience: one may be required to pay taxes to a state, although one does not thereby become a citizen; one may pay tuition to attend a parochial university, without thereby becoming a co-religionist; one may pay to receive treatment in a Shriners' Hospital, without joining the Shrine.

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[23] Labor-Management Reporting and Disclosure Act, 1959, 73 Stat. 522, 29 U.S.C. § 411(a)(1):

> "Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections . . ., to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings. . . ."

[24] See, *e.g.*, U.A.W. Local 756 v. Woychik, 5 Wis. 2d 528, 93 N.W. 2d 336 (1958). See generally, 87 C. J. S. Trade Unions § 35(b) (1954).

A member's dues may be used for a variety of purposes, in addition to meeting the union's costs of collective bargaining. Rather typically, unions use their members' dues to promote legislation which they regard as desirable and to defeat legislation which they regard as undesirable, to publish newspapers and magazines, to promote free labor institutions in other nations, to finance low cost housing, to aid victims of natural disaster, to support charities, to finance litigation, to provide scholarships, and to do those things which the members authorize the union to do in their interest and on their behalf.

Under the instant contract, however, the service fees paid by non-members are restricted and can be used only "for the purpose" of "defraying costs" incurred by the union in performing collective bargaining services (R. 9). Use of service fees for purposes other than "defraying costs" of collective bargaining for employees in this bargaining unit would presumably be subject to the grievance and arbitration machinery of the contract and might additionally give rise to a common law or § 301(a) contract action.[25] *Cf. International Association of Machinists* v. *Street*, 367 U.S. 740 (1961). An employee who believed that his fee payments were being used for unauthorized purposes, for example, could refuse to pay on these grounds, and the issue of his right to refuse to pay could be submitted by the union to the grievance machinery to determine whether the employer has a duty to discipline such an employee.

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[25] Article 6, Section 1, of the contract provides that "*any* differences, disputes or complaints arising over the interpretation or application of the contents of this Agreement" shall be subject to the grievance machinery and abitrable thereunder (R. 13 [p. 3]).

The *amount* of *dues* charged union members under this contract is entirely an internal union matter, subject only to the democratic action of its members. With respect to changes in the union's dues for members, the employer has no voice, and changes in union dues would not be arbitrable under the contract. On the other hand, the amount charged non-members as service fees, solely "for the purpose" of aiding the union in "defraying costs" of collective bargaining, has been fixed and established by the contract.[26] While the amount of the service fee might change as the union's collective bargaining costs change, it must always bear a close relationship to actual collective bargaining costs.

Just as the union's improper use of service fees under this contract might be the subject of a grievance or common law action, so too the grievance machinery might be invoked or a lawsuit commenced if the union seeks to collect service fees which exceed its actual costs.[27]

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[26] In *Northway Products Co.*, 39 L.A. 791 (1962), an arbitrator ruled that non-member employees under an agency shop agreement were, unlike members, not required to pay an initial service fee to the union because the contract made no such requirement for non-members. This case illustrates the principle involved in the instant case that the *amount* or fees charged non-members is subject to the contract's grievance machinery.

[27] Unfortunately, this action was instituted just a month after this contract became effective, and for this reason the parties had no time in fact to begin the process, contemplated in the contract, of computing the union's costs as a basis for formulating the amount of service fees to be charged. At the very outset, therefore, the record shows only that the parties began the operation of the contract by requiring non-member employees to pay amounts in fees equal to membership dues then in effect (R. 8). This was a starting figure which in the absence of any experience in an

In every possible respect, therefore, the non-member service fee under this contract does not fit within the "membership" concept in § 14(b), for the non-member neither enjoys the rights nor bears the duties of the member. He pays impersonally for services of value rendered to him, without acquiring any of the social, economic and moral commitments of membership.

It is inescapably clear, therefore, that Florida has not regulated a contract requiring "membership," but a contract which does not require "membership."

III. THE LEGAL BASIS OF THE SERVICE FEE LIES IN THE UNION'S DUTY UNDER THE ACT TO REPRESENT NON-MEMBERS AND TO MAKE EXPENDITURES ON THEIR BEHALF. THE SERVICE FEE IDEA IS AN OLD ONE IN LABOR RELATIONS, AND IT HAS BEEN INTERNATIONALLY ADOPTED.

The service fee concept has a legal and moral basis in the union's enforceable duty, as exclusive bargaining agent, to represent *all* bargaining unit employees, regardless of their membership. It is premised on the self-evident proposition that one who is required to provide valuable services should suffer no loss for having conferred a direct benefit.

Respondents alleged in the trial court that they "are not and do not want to be members of the Union,"

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accounting sense was obviously an arbitrary figure. Whether over a period of a year or more the service fee would have become less than membership dues is of course speculative.

The amount of the fees here has never been challenged as to reasonableness in terms of the value received. Moreover, the plaintiffs in their complaint attacked the requirement that they be charged any fees for any purposes (R. 5): ". . . plaintiffs do not want . . . . to pay defendant Union *any* dues or service fees."

Similarly the Florida Supreme Court ruled that any required fee payment in any amount and for any purpose is prohibited by the Florida law as an "abridgement" of the right to work (R. 29).

neither do they want to pay "*any*" service fees to the Union (R. 5). They made no complaint, however, about the reasonableness or fairness of the fees in relation to the services and benefits which they have and will continue to receive as an immediate result of the union's efforts and expenditures on their behalf. While respondent's might prefer to be completely free of any association with petitioners, Justice Douglas has wisely said that "Some forced associations are inevitable in an industrial society." *International Association of Machinists* v. *Street*, 367 U.S. 740, 775 (1961) (concurring opinion).

Petitioner union, as the selected majority bargaining agent for the unit in which respondents are employed, is, like a legislature, "under an *affirmative constitutional duty* equally to protect" respondents' rights. *Steele* v. *Louisville & Nashville R. Co.*, 323 U.S. 192, 198 (1944). (emphasis added). This duty requires "the union, in collective bargaining and in making contracts . . . to represent non-union or minority union members . . . without hostile discrimination, fairly, impartially, and in good faith." *Id.* at 204.

The duty of fair representation applies not only to unions subject to the Railway Labor Act but equally to unions under the Taft-Hartley Act. *Syres* v. *Oil Workers*, 350 U.S. 892 (1955) (memorandum). Under the Taft-Hartley Act, the "bargaining representative, whoever it may be, is responsible to, and owes complete loyalty to, the interests of all whom it represents." *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 338 (1953). The National Labor Relations Board has recently held that the exclusive bargaining agent's duty of fair representation is also enforceable through Taft-Hartley's unfair labor practice sanctions. *Miranda*

Fuel Co., 140 N.L.R.B. No. 7 (1962). See generally, Cox, The Duty of Fair Representation, 2 Vill. L. Rev. 151 (1957).

It would be a strange doctrine which places a labor organization under an enforceable legal duty to represent non-member employees in collective bargaining, requiring the expenditure of members' money on their behalf, but which deprives the union of the right to charge such non-members the actual cost of those services. Indeed, the union's required expenditures for non-members, if not recoverable through a reasonable service fee, might raise a question of deprivation of property without due process. We can think of no other analagous situation in American law where an essentially private organization, vested with a public interest, can be legally required to spend money for the benefit of third parties with no right of recovery. Not even privately owned utilities—which are much more closely regulated than unions—are required to provide services without charge.

The Court may take judicial notice that the costs of collective bargaining are substantial, for, as the subjects of collective bargaining have increased over the decades, the bargaining agent's duties and expenses have proportionately increased.[28] Among these costs are the following:

1. *Negotiating Contracts:* Payment of officers, representatives, and outside experts for bargaining table participation and advanced planning; compensating employee members of bargaining committees for time spent away from their jobs;

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[28] See generally, Barbash, The Practice of Unionism 185-195.

expenditures for meeting rooms, and related expenses such as printing contracts.[29]

2. *Policing and Administering Contracts:* Investigating grievances; routine patrolling of contract terms; processing grievances through the grievance machinery up to arbitration; securing advice as may be required from economists, engineers, lawyers, accountants, actuaries, and even doctors.

3. *Arbitration:* It is a problem of widespread concern that the costs of submitting a grievance to arbitration have increased enormously in recent years.[30] The contract in question lists some of them and requires the union to pay half: "hearing room, stenographer, transcript for each party, and the Arbitrator's fees" (R. 13 [Article 6, Section 2, p. 4].) Some arbitrable issues additionally require the union to use the services of lawyers and other professionals.

4. *Other Costs:* A myriad of other costs of collective bargaining devolve upon the bargaining agent, including maintaining an office for record-keeping and meetings, strikes, picketing, lawsuits, filing unfair labor practice charges, operating

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[29] "The injection of expertise into negotiations has brought with it experts. Lawyers, economists, engineers, insurance consultants are prominent figures in the negotiations or in the background of negotiations," Barbash, The Practice of Unionism 190.

[30] Manson, Is Arbitration Expendable, 12 NYU Conference on Labor 8-14 (1959); Controlling Costs, in Labor Arbitration, 14 Arb. J. 26-29.

The costs of a single arbitration case have been as high as $175,000. Kuhn, Arbitration in Transit 188 (1952), quoted in Manson, *ibid.*

credit unions, making time and motion studies, participating in the administration of health, welfare and pension trusts and counseling members.

The services of the bargaining agent are so varied that during strikes, for example, unions pay strike benefits which support non-members and their families as well as members. See *United States* v. *Kaiser*, 363 U.S. 299, 300-301 (1960).

For these reasons it is simply nonsense to assert that a service fee arrangement is a subterfuge to compel "membership." The union's legally enforceable duty is to represent *all* employees regardless of membership. It has no choice. Elementary fairness, therefore, dictates that the union be permitted to charge non-members for the services which the union must provide them, where the employer voluntarily agrees to such an arrangement in collective bargaining.

The service fee arrangement has been known in American industry for many years.[31] It was even ordered for inclusion in contracts by the War Labor Board. *E.g.*, *Alexander Primas Co.*, 21 War Labor Bd. Reps. 219, 221 (1943).

The philosophical and labor relations justification for a fair, ratable service fee arrangement has been

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[31] Millis and Montgomery, Organized Labor 484 (1945). The authors of this famous treatise point to the execution of an "agency shop" agreement with a major tobacco manufacturer in 1942. Describing the purpose of such a contract, they observe, at p. 484:

> "This type of arrangement spreads union costs equally over those who benefit from the collective-bargaining agreement but leaves individuals free to participate in the union, or not, or to form other unions."

lucidly articulated in a recent report by Saul Wallen, Patrick Fisher and Lewis M. Gill, acting as members of the President's Boeing Aerospace Board. (Report to the President, President's Boeing Aerospace Board 12-13, Jan. 2, 1963.)

> ". . . The union by law is the bargaining agent for all employees in the unit. The benefits it negotiates must be granted to all employees, members and non-members alike. Neither it nor the company can discriminate by limiting the benefits to union members alone. Hence non-members automatically benefit from the union's negotiating efforts. But only the union members foot the bill.
>
> "This condition inevitably rankles the . . . employees who carry the full cost. The resentments engendered must be a divisive influence in the work force, a moral depressant with concomitant effects on efficiency.
>
> "It is axiomatic that taxation without representation is tyranny. The reverse is equally true. The enjoyment of the fruits of representation without payment of one's proportionate share of the cost is similarly repugnant."

The service fee concept, which requires non-members to pay a ratable share of the costs for the services which they enjoy, is by no means a uniquely American notion.

The Swiss Federal Court, for example, had upheld the legality of a service fee arrangement for non-members known in Swiss law as "loyalty to the contract" combined with a "solidarity levy." *Muller and the Swiss Federation of Autonomous Trade Unions* v. *Zurich Garage Owners' Associations and Swiss Federation of Metal and Watch Workers (Zurich*

Branch), A.T.F. 72 II 305 (1949), quoted in Berenstein, Union Security and the Scope of Collective Bargaining Agreements in Switzerland, International Labor Review 101, 113 (Feb. 1962):

> ". . . . it would not be fair to allow an outsider, without making any financial sacrifice, to benefit by the many advantages afforded by a collective agreement, in negotiating and implementing which the contracting organizations have incurred considerable expenditure that has been met out of their members' contributions."

In Denmark, labor organizations administer the national unemployment insurance program, and non-union workers are required to pay an added premium of one-third to the labor organization in their industry to help defray its costs in administering the program. Jensen, Trade Union Dues in Denmark, No. 143 Free Labor World 171 (1962).

Canada, which often is given credit for having originated the "agency shop," has widely adopted service fee arrangements. Shister, Aaron and Summers, Eds., Public Policy and Collective Bargaining 101-102 (1962). See also, Dudra, Union Security in Canada, 12 Lab. L.J. 585, 592-593 (1961).

There has recently emerged a service fee system of financing bargaining functions in the Caribbean area which "allows a worker to remain a non-unionist, while he pays the weekly union subscription like everyone else." Dyce, The Check-Off System in the Caribbean, No. 142 Free Labor World 130, 131 (1962).

Both in law and in fact, therefore, the service fee arrangement in Article 19, Section 2, of the instant contract cannot be regarded as either a compulsory

membership arrangement or as a subterfuge to compel "membership." It is instead a natural concomitant of the union's legally enforceable duty to spend sums for services for non-members.

IV. CONGRESS CHOSE ITS WORDS CAREFULLY IN WRITING SECTION 14(b). FOR THE LEGISLATIVE PURPOSE WAS DIRECTED ONLY TO COMPULSORY "MEMBERSHIP." THE LEGISLATIVE HISTORY REFLECTS NO POLICY TO PERMIT THE STATES TO PROHIBIT A TRUE SERVICE FEE ARRANGEMENT.

Section 14(b) as finally enacted was drafted entirely in a Conference Committee. (See House Conf. Rept. No. 510, pp. 17-18, 80th Cong., 1st Sess., 1 Leg. Hist. of LMRA 521-522.) It had a predecessor in § 13 of H.R. 3020 which passed the House. (1 Leg. Hist. of LMRA 207-208.)

> "Sec. 13. Nothing in this Act shall be construed to invalidate any State law or constitutional provision which restricts the right of an employer to make agreements with labor organizations *requiring as a condition of employment membership in such labor organization*, and all such agreements, insofar as they purport to impose such requirements contrary to the provisions of the law or constitution of any State, are hereby divested of their character as a subject of regulation by Congress under its power to regulate commerce among the several States and with foreign nations, to the extent that such agreements shall, in addition to being subject to any applicable preventive provisions of this Act, be subject to the operation and effect of such State laws and constitutional provisions as well." (Emphasis added.)

Congress' purpose in enacting Section 14(b) was to authorize the states to enforce "anti-closed shop" and "anti-union shop" laws.

As this Court has said, "§ 14(b) of the Taft-Hartley Act . . . makes the union shop agreement give way before a state law prohibiting it." *Railway Employees Dept.* v. *Hanson,* 351 U.S. 225, 232, n. 5 (1956). In both legal and labor relations terminology, a closed shop is one in which employees are required to be *members* of a union *before* they may be employed, and the union shop, on the other hand, is one in which employees are required to become *members* at some time *after* they have been employed.[22]

In Senate Report No. 105, which accompanied S. 1126, there is a revealing discussion of compulsory union membership under the Wagner Act, which suggests that it was the Committee's belief that even under the Wagner Act the States were free to legislate on the subject of the "closed shop." (Senate Rept. No. 105, 80th Cong., 1st Sess., p. 6, 1 Leg. Hist. of LMRA 412.)

> "When the committees of the Congress in 1935 reported the bill which became the present National Labor Relations Act, they made clear that the proviso in *section 8(3) was not intended to override State laws regulating the closed shop.* The Senate Committee stated that 'the bill does nothing to facilitate closed-shop agreements or to make them legal in any State where they may be illegal.'" (Emphasis added.)

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[22] Justice Black has observed that the terms "closed shop" and "union shop" are sometimes used synonomously. *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.,* 335 U.S. 525, 527, n. 2 (1949), but both phrases, however used, refer to union membership as a condition of employment. *Cf. Railway Employees Dept* v. *Hanson,* 351 U.S. 225, 231, n. 3 (1956).

See also Gregory, Labor and the Law 115 (Rev. Ed.); Barbash, The Practice of Unionism 156.

The debates in the House similarly suggest that Section 13 of H.R. 3020 was intended to authorize the States to ban the "closed shop." Thus, Representative Barden of North Carolina explained to Representative Hoffman, in an extended colloquy, that Section 13 of H.R. 3020 was intended to achieve this result. (93 Cong. Rec. 621, 1 Leg. Hist. of LMRA 748.)

> "It [Section 13] is dealing with a very technical question of regulating commerce between the several states and in view of the fact that many of the states have passed laws dealing with the closed shop, why, then, the committee felt that the states should be recognized and their laws should certainly be given full power and effect as far as a state is concerned."

In the Senate debates, similar understandings of the purpose of § 14(b) as reported by the Conference Committee are expressed. For example, Senator Morse made the following observations about § 14(b). (93 Cong. Rec. 6614, 2 Leg. Hist. of LMRA 1561.)

> "Mr. President, we are dealing under a national policy with interstate commerce. The jurisdiction of the National Labor Relations Board is limited to interstate commerce cases and issues. *But this amendment proposes that we except from the national policy as it relates to interstate commerce national jurisdiction over these matters as they involve the closed shops and union shops in the case of any state which passes an anti-closed shop or anti-union shop bill.*" (Emphasis added.)

Senator Taft, a principal sponsor of the bill, explained in a Senate debate why § 14(b) had been approved by the Senate conferees. (93 Cong. Rec. 6679, 2 Leg. Hist. of LMRA 1596-1597.)

"I merely wish to make it clear that in the report of the Committee on Labor and Public Welfare to the Senate, we stated that in our opinion there was nothing in the bill as originally reported by the committee which in any way would invalidate the provisions of a State law prohibiting the closed shop. That statement appears in the committee report to the Senate, on page 6. In it we pointed out that when the National Labor Relations Act was enacted, it was made clear in the report at that time that the proviso in section 8(3) was not intended to override State law regulating the closed shops. At that time the Senate committee stated that the bill did nothing to facilitate closed-shop agreements or to make them legal in any State where they may be illegal.

"In other words, the whole spirit of the Wagner Act and its provisions would prohibit a closed shop, because it prohibits discrimination against people who are not members of labor unions. *In order to preserve that right and to keep the Wagner Act itself from abolishing the closed shop everywhere, it was necessary to write in this proviso.* But that did not in any way prohibit the enforcement of State laws which already prohibited closed shops.

"That has been the law ever since that time. It was the law of the Senate bill; and in putting in this express provision from the House bill, we in no way change the bill as passed by the Senate of the United States." (Emphasis added.)

During the same colloquy with Senator Taft, Senator Barkley also expressed the view that § 14(b) of the Conference Bill was intended only to authorize the

operation of state anti-closed shop laws.[33] And in a radio address following President Truman's veto, Senator Taft urged that the conference bill be passed over the presidential veto. In this speech Senator Taft again suggested, in an obvious reference to § 14(b), that it was intended merely to allow the application of state anti-closed shop and anti-union shop laws in interstate commerce.[34]

From the foregoing recital of the legislative history of § 14(b), it is perfectly clear that Congress' specific concern in this provision was to permit the States to prohibit the "closed shop" and the "union shop." Compulsory membership was Congress' concern, and it was compulsory membership alone which Congress authorized the States to proscribe.

In 1947, while Congress was considering this legislation there were some 12 states which prohibited

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[33] 93 Cong. Rec. 6679, 2 Leg. Hist. of LMRA 1597:

"Mr. BARKLEY. The provision of the measure which exempts any state from the operation of its provisions, if such state has outlawed the closed shop therefore in effect adopts the state as the agency through which the regulation of interstate commerce shall take place insofar as the closed shop is regulated.

"Mr. PEPPER. That is exactly correct.

"Mr. BARKLEY. So in the states whose legislatures desire to exempt their own interstate companies from the operation of this law all they need to do is to pass a law outlawing the closed shop. Thus they will affect both interstate as well as intrastate companies."

[34] 93 Cong. Rec. A. 3232, 2 Leg. Hist. of LMRA 1627:

"The president criticizes the provision that state laws prohibiting union shops are to remain in effect. He does not tell you that this is the provision of the Wagner Act which has never undertaken to authorize closed-shop agreements if the state law prohibits them."

agreements requiring membership in a union as a condition of employment. The Senate Labor Committee specifically mentions the Florida law here in question. Senate Report No. 105 to accompany S. 1126 notes that "these regulatory measures have not received authoritative interpretation by the Supreme Court," citing *A. F. of L.* v. *Watson*, 327 U.S. 582 (1946). S. Rept. No. 105 on S. 1126, p. 6, 1 Leg. Hist. of LMRA 412.

Congress' contemporaneous understanding of the purpose of these state laws—which Congress sought to authorize—is clearly revealed in the *Watson* case, *supra*, which challenged the validity of the Florida law on grounds that it violated First and Fourteenth Amendment rights and that it was in conflict with the Wagner Act. This Court held that a test of the constitutionality of this law was premature because it has not yet been construed by the state courts. In describing the Florida law, the Court said, 327 U.S. at 586:

> "The theory of the appellants is that *the law in question outlaws any agreement which requires membership in a labor organization* as a condition of employment all of which we refer to herein as the closed shop." (Emphasis added.)

In his Statement Opposing Jurisdiction, the Attorney General of Florida said to this Court that the Florida law: (No. 448, October Term, 1945)

> "prohibit(s) the making and enforcing of the 'closed shop' or as appellants call them 'union security agreements.' The people of Florida have decided that they do not want the 'closed shop.'" (At p. 3.)

Thus, the legislative history demonstrates that Congress' purpose in § 14(b) was simply to preserve the operation of anti-closed shop and anti-union shop statutes which prohibited compulsory membership, nothing more or less. In the face of this clear and definite legislative history, the Florida court's expansive views of its authority under this limited exception to the comprehensive federal law is totally unwarranted.

V. SECTION 8(a)(3) AUTHORIZES THE EXECUTION OF AGREEMENTS REQUIRING "MEMBERSHIP IN A LABOR ORGANIZATION" AS A CONDITION OF EMPLOYMENT, NOT MERELY "SUPPORT MONEY" AGREEMENTS.

Although this Court has said that the "language of § 8(a)(3) of the Act[35] is not ambiguous," *Radio*

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[35] "Sec. 8. (a) It shall be an unfair labor practice for an employer— . . .

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made . . ., Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;"

Officers Union v. *Labor Board*, 347 U.S. 17, 42 (1954), some state courts have read into § 8(a)(3) a non-existent ambiguity to support their view that the federal law does not permit the execution of contracts which actually require "membership" in a union. They assert that § 8(a)(3) permits at a maximum a "support money" contract. Thus, they say, because § 8(a)(3) does not really permit compulsory membership but only an agency shop in practical effect, Congress must have intended to authorize the States to prohibit an agency shop under § 14(b)—regardless of Congress' language. Undoubtedly, it will be so argued here.

The Supreme Court of Kansas, for example, in *Higgins* v. *Cardinal Mfg. Co.*, 188 Kan. 11, 360 P. 2d 459 (1961), *cert.* denied 368 U.S. 829 (1961), has so argued (118 Kan. at 23, 360 P. 2d at 465):

> ". . . Congress intended that an employee who paid the required union initiation fees and dues fulfilled his obligation under a union shop contract, and that *the union could not require any other act as a condition of employment* usually required prior to becoming a member. Therefore, since the payment of union dues and fees is the only support of the union permitted by federal law *for unions to require as a condition of employment* under union-security agreements, and not actual membership, the expression 'membership in a labor organization as a condition of employment' in section 14(b) of the Taft-Hartley Act becomes synonymous with payment of union dues and fees for enforcement purposes under union-security agreements so far as labor unions and employers are concerned." (Emphasis in original.)

The first proviso of § 8(a)(3) provides that "nothing . . . shall preclude an employer from

making an agreement with a labor organization . . . . to require as a condition of employment *membership* therein on or after the thirtieth day following the beginning of such employment . . ." Thus, if § 8(a)(3) and § 14(b) are parallel in any respect, the parallel is only between the *first* proviso of § 8(a)(3), which authorizes agreements requiring *membership*, and § 14(b), which authorizes the States to prohibit agreements requiring *membership*. In other words, § 14(b) permits the States to prohibit only what is otherwise allowed under the first proviso to § 8(a)(3), but it does not permit the States to prohibit required service fee payments which are unrelated to membership.

If the analysis of the Kansas court were correct, then Congress chose a most awkward way to express its intention. Had Congress' intention been that ascribed to it by the Kansas court, Congress would have expressed itself directly to permit the states to prohibit under § 14(b) that which is otherwise permitted under § 8(a)(3). Congress would simply have permitted the States to prohibit not only agreements requiring membership but also agreements requiring any payments of any kind to a union. A number of right-to-work states have realized that a prohibition of compulsory membership does *not* embrace the prohibition of fee payments, and they have expressly prohibited the required payments of "dues, fees or other charges of any kind to any labor union." Miss. Code Ann. § 6984.5, Sec. 1(e), Supp. 1958. Moreover, several such state statutes were passed shortly before the Taft-Hartley Act, so that it may be assumed that Congress simply did not intend to permit the States to prohibit service fee contracts under § 14(b). See, e.g., N.C. Gen. Stat. Ann. § 95-82 (effective March 18,

1947), and Tenn. Code Ann. § 11412.10 (effective February 21, 1947).

The view that § 8(a)(3) does not in reality permit a contract requiring "membership" rests on a misreading of the language and purpose of this section's second proviso. Part (A) of the second proviso limits an employer's power to *discriminate* against an employee's job rights under a union membership contract if "membership" itself is not made available by the union to all bargaining unit employees on the "same terms and conditions generally applicable to other members." Thus, part (A) of the second proviso, if anything, underscores § 8(a)(3)'s authorization for compulsory membership, for it provides only that a union may not establish discriminatory or unequal terms for acquisition of membership, if the contract requires employees to become union members.

Part (B) of the second proviso to § 8(a)(3) similarly restricts an employer's power to *discriminate* against an employee's job rights under a membership contract if the union *denies* or terminates membership for reasons other than the payment of uniform and periodic dues and fees. Thus, part (B), like part (A), merely limits an employer's right to discriminate against an employee's job rights if the union's own standards for acquiring and retention of membership exceed a requirement of dues and fees payments and if, for this reason, *membership* is denied.

Neither part (A) nor part (B) of the second proviso limits the right of an employer and a union to compel union "membership"; however, a union may not impose unequal terms for acquiring and retaining membership [Part (A)] and may not make membership contingent upon *standards* other than dues and

fees [Part (B)] if the union seeks to cause discrimination against an employee for non-membership. "Membership" is what § 8(a)(3) permits parties to require, not the mere payment of support money to the union without membership.

Certainly under § 8(a)(3) parties may write a union shop agreement which states the requirement that all employees must become "members" of the union. Employees do join the union in response to such a stated requirement. If only dues and fees could lawfully be required under § 8(a)(3), it would be unlawful to negotiate a contract requiring "membership," but no one has even suggested such result. Thousands of such compulsory membership contracts now exist and are recognized as lawful by the Board and the courts.

Union Starch & Refining Co. v. *Labor Board*, 186 F. 2d 1008 (7th Cir. 1951), *cert. denied* 342 U.S. 815, has been sometimes misread as interpreting § 8(a)(3) to mean that the only lawful requirement which may be imposed on an employee "as a condition of employment" is the payment of uniform dues and fees, without regard to union "membership." This reading is inaccurate.

Three employees were discharged in *Union Starch* at a union's request because they had tendered union membership dues and fees but were either unable or unwilling for religious reasons to comply with *other* conditions of membership, *i.e.* filling out a membership application, attending a union meeting and taking a member's oath. The Board, reversing its trial examiner, concluded that these employees were *"willing" to join* the union but were unwilling to comply with other *conditions of membership* estab-

lished by the union. As a result of their failure to comply with these other membership conditions, they were *denied membership* and consequently were discharged. The Board's majority ruled that it was unlawful to discharge these employees because *membership* had been *denied* them in the face of their willingness to join. *Union Starch & Refining Co.*, 87 N.L.R.B. 779, 785 (1949).

On appeal, the Seventh Circuit agreed with Board's analysis. Like the Board, the court found that the employees were willing to join the union but that, for failure to comply with extraneous conditions of membership, they had been denied membership. In support of its conclusion, the Seventh Circuit relied on Senator Taft's explanation on the floor of the Senate as to § 8(a)(3)'s meaning, 186 F. 2d at 1012, quoting from 93 Cong. Rec. 4272:

> "The union could refuse the man admission to the union . . . but *if he were willing to enter the union* and pay the same dues as other members of the union he could not be fired from his job because the union refused to take him." (Emphasis added.)

If there is any doubt that *Union Starch* stands for the proposition that membership may be required under § 8(a)(3), the Board's brief in this Court, in opposition to the petition for a writ of certiorari, eliminates it. N.L.R.B. Brief in Opposition to Pet. for Cert. at p. 16, Oct. Term, 1951, No. 64.

> "The Board's interpretation of proviso (B), like that of the court below, *rests on the premise that the employees here not only tendered dues and fees but also manifested a desire to become union members.*" (Emphasis added.)

In its original *General Motors* decision, 130 N.L.R.B. 481 (1961), at least two and probably a majority of the members of the N.L.R.B., for reasons not here relevant, indicated that the *Union Starch* permits parties to require actual membership.[38]

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[38] Member Jenkins observed about the Board's *Union Starch* decision, 130 N.L.R.B. at 496:

> "In a decision which considers at length the legislative history of the provisos to Sec. 8(a)(3), the Board concluded that *proviso (B) protects the employee who tenders the requisite amount of dues and initiation fees and is denied membership* for any other reason . . . It concluded that if a union 'imposes any other qualifications and conditions for membership with which he is unwilling to comply, such an employee may not be entitled to membership, but he is entitled to keep his job.' While this gives the employee the privilege of refusing with impunity to comply with additional requirements for membership, or of membership, *it cannot be said to equate 'membership' with the payment of periodic dues and initation* fees." (Emphasis added.)

Chairman Leedom agreed with Member Jenkins' view of the meaning of § 8(a)(3), for he said, *id.* at 486:

> "Note 7. By 'literal membership' I mean the right of a union to require actual membership as a condition of employment, and a willingness to admit to membership all employees who tender the requisite initiation fees and dues; cf. Union Starch & Refining Company, 87 NLRB 779; Radio Officers' Union v. NLRB, 347 U.S. 17, *supra*. *Neither of these cases stands for the proposition that payment of initiation fees and dues can be required when literal* membership cannot." (Emphasis added.)

Member Kimball did not discuss *Union Starch* in his separate concurring opinion, but he expressed agreement with the "ultimate result" reached by Chairman Leedom and Member Jenkins. It may, therefore, fairly be said that a majority of the Board has recently agreed that § 8(a)(3), as interpreted by *Union Starch*, requires actual membership in the union, not merely the payment of money to the union.

A leading arbitration decision similarly had held that, under a compulsory membership contract, an employee's duty is to join the union, not merely to tender dues and fees. *Pan American World Airways,* 20 L.A. 312 (1953). There arbitrator Aaron Horvitz, while dealing with a union and an employer subject to the Railway Labor Act, relied on the legislative history of § 8(a)(3) of the Taft-Hartley Act and particularly on *Union Starch.* Of *Union Starch,* the arbitrator said, 20 L.A. at 315:

> "That case was decided on the assumption that the employees had requested membership but had been refused because of their unwillingness to comply with certain conditions."

Mr. Horvitz supports his conclusion with a careful recitation of the legislative history of § 8(a)(3), 20 L.A. at 315:

> "The language of the committee reports likewise indicates that an obligation to seek union membership was clearly contemplated. The House report explained that the parties might make an agreement *'requiring employees to become and remain members of the Union'* and added, significantly, that 'Employees have 30 days to decide *whether or not to join the union.*' House Rep. No. 245 on H.R. 3020, p. 9 . . . A provision in the House bill, later dropped, guaranteed the right to resign from a union. But the committee was careful to note that if a union-shop agreement were in effect 'his resigning may result in his losing his job.' Id. p. 32. This was surely a recognition that the employee's manifested willingness to be a member was relevant, quite apart from his willingness to pay dues." (Emphasis added.)

Senator Taft's unambiguous explanation similarly was relied on, 20 L.A. at 316:

> ". . . we have proposed a proviso in the case where a man is refused admittance to a union, when an employer employs a nonunion man, and during the first 30 days *he goes to the union and says, 'I want to join the union,'* but the union refused to take him . . . In effect we say, 'If you are going to have a union shop, then you must have an open union.' " (93 Cong. Rec. 3953.) (Emphasis added.)

Although this Court has not decided the full scope of the "membership" requirement in the first proviso of § 8(a)(3), in relationship to part (B) of the second proviso, the Court has on at least two occasions suggested that part (B) does not convert the first proviso into a mere support money requirement unrelated to membership. In *Radio Officers Union* v. *Labor Board*, 347 U.S. 17 (1954), which dealt principally with the problem of what constitutes discrimination "to encourage" union membership, the Court commented on the legislative history and policies underlying § 8(a)(3) and § 8(b)(2) as follows, 347 U.S. at 40-42:

> "The policy of the Act is to insulate employees' jobs from their organizational rights. Thus §§ 8(a)(3) and 8(b)(2) were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood. The only limitation Congress has chosen to impose on this right is specified in the proviso to § 8(a)(3) which authorizes employers to enter into certain union security contracts, but prohibits discharge under such contracts if membership 'was not available to the employee on the same terms and conditions generally

applicable to other members' or if 'membership was denied or terminated for reasons other than the failure of the employee to tender periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership.' Lengthy legislative debate preceded the 1947 amendment to the Act which thus limited permissible employer discrimination. This legislative history clearly indicates that Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees. Thus, Congress recognized the validity of unions' concern about 'free riders,' i.e., employees who receive benefits of union representation but are unwilling to contribute their share of financial support to such union, and gave unions the power to contract to meet that problem while withholding from unions the power to cause the discharge of employees for any other reason. *Thus an employer can discharge an employee for nonmembership in a union* if the employer has entered a union security contract valid under the Act with such Union, and if the other requirements of the proviso are met. No other discrimination aimed at encouraging employees to join, retain membership, or stay in good standing in a union is condoned." (Emphasis added.)

Similarly, sustaining the constitutionality of the union membership authorization requirement of the Railway Labor Act, § 2 Eleventh, as amended, 64 Stat. 1238, 45 U.S.C. § 152 Eleventh, which is substantially like § 8(a)(3), the Court's decision suggests that the power to negotiate union membership agreements is not merely a "support money" authorization. *Railway Employees Dept.* v. *Hanson*, 351 U.S. 225 (1956). The Court describes the required payment of dues, fees and assessments as "conditions to union membership authorized" by the Act. *Id.* at 235. Implicit in the

Court's analysis of the constitutional objections to the union shop authorization in that Act is the assumption that membership is what Congress there permitted parties to require. *Id.* at 236-238.

> "It is said that once a man *becomes a member* of these unions he is subject to vast disciplinary control and that by force of the federal Act unions now can make him conform to their ideology.
>
> "On the present record, there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar. *It is argued that compulsory membership will be used to impair freedom of expression.* But that problem is not presented by this record. Congress endeavored to safeguard against that possibility by making explicit that no conditions to membership may be imposed except as respects 'periodic dues, initiation fees, and assessments.' If other conditions are in fact imposed, or if the exaction of dues, initiation fees or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case . . . We express no opinion on the use of other conditions to secure or maintain *membership* in a labor organization operating under a union or closed shop agreement." (Emphasis added.)

Thus, the argument that § 8(a)(3) does not in reality permit a "membership" requirement, but only a support money requirement, is fallacious, for it ignores the language of § 8(a)(3), the legislative history and the cases interpreting it. While we assume that respondents will attempt to make this argument here, the court below did not rely on this argument at all.

VI. THE RELATIONSHIP OF GENERAL MOTORS TO THE INSTANT CASE CLEARLY SHOWS THAT SECTION 14(b) IS NO MORE THAN A SINGLE, LIMITED EXCEPTION TO THE LABOR ACT.

In granting certiorari to the Sixth Circuit in *Labor Board* v. *General Motors,* No. 404, this Term, and in scheduling the instant case to be argued following *General Motors,* the Court has recognized the important statutory and factual relationship between these two cases.

While both of these cases have been loosely termed "agency shop" cases, they differ in significant factual respects. The clause in *General Motors* requires non-member employees to pay amounts *equal* to the union's membership dues and fees. *General Motors* v. *Labor Board,* 303 F. 2d 428 (6th Cir. 1962). The *amount* of the fees in *General Motors* is strictly tied to the union's dues schedule, subject to change unilaterally by the union's membership and is altogether beyond the control of the grievance machinery of the contract. Moreover, the *purpose* of the fees and the *use* to which the fees may be put in *General Motors* are unrestricted, and the union in *General Motors* presumably is free to use fees so received for purposes other than meeting actual costs of collective bargaining.

In *Schermerhorn,* however, as pointed out earlier, the contract fixes the amount of fees to be paid at the level of actual collective bargaining costs, and the union's membership has no power to change the amount of the fees. The *Schermerhorn* contract similarly limits the *purpose* for which fees may be collected from non-members solely to defraying the union's collective bargaining costs on behalf of non-members. The use of such fees for non-collective bargaining purposes would give rise to a grievance

under the contract, and a grievance could be filed if the union sought to charge non-members fees in excess of the union's actual collective bargaining costs.

Whether the contract in *General Motors* might lawfully be proscribed by a state under § 14(b) as one requiring "membership" is a question of fact not here present, and the Court is not required to decide whether the clause in the *General Motors* contract would be valid under Florida law. Moreover, while we believe that the service fee clause in *Schermerhorn* is perfectly lawful under § 8(a)(3) of the federal Act because it does not "encourage" membership in the union, the Court need not decide finally whether the *Schermerhorn* clause is lawful as a matter of federal law.[37]

In deciding whether the agency shop contract in *General Motors* might properly be regulated by the States under § 14(b), a determination would be made, on the basis of a full factual record, whether the

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[37] Although we believe it is unnecessary for the Court to consider the ultimate legality of the *Schermerhorn* service fee arrangement under federal law, we believe that its legality is beyond question, for it is a non-discriminatory arrangement freely arrived at as a result of good faith collective bargaining.

It is our view that the *Schermerhorn* contract not only is not prohibited by § 8(a)(3) of the Act but that it is completely outside the scope and contemplation of § 8(a)(3) which prohibits "discrimination . . . to encourage membership" in a union. Giving employees the freedom to choose between membership and the right to remain completely aloof from membership by paying collective bargaining service fees is the optimum of personal liberty. Whatever a worker's reasons—personal, religious, or ideological—the *Schermerhorn* contract permits the worker to decide for himself whether he desires formal association with the Retail Clerks Union as a member or whether he desires to remain completely independent of the union's goals, its constitution and its disciplinary power over members.

requirements made of employees under that contract are so nearly like the requirements of "membership" in § 14(b) that the States may properly regulate it. Thus, in an appropriate proceeding, the Board would look to such factors as the amount of fees charged non-members, the use to which such fees are put, the right of non-members to participate in the union's internal affairs, and other such factors. This is, in short, the traditional kind of fact finding process in which the Board has always engaged. While we cannot here speculate how the Board might view the *General Motors* contract if its validity were challenged in Florida, it is sufficient here to observe that the factual difference between the *General Motors* contract and the *Schermerhorn* contract are significant.

Because the *General Motors* case has been scheduled for argument with *Schermerhorn*, it might be argued by respondents that, if the Board's decision in *General Motors* validating that agency shop agreement is sustained by this Court under § 8(a)(3) (which would require reversal of the Sixth Circuit's decision), then the Florida decision should automatically be affirmed in *Schermerhorn*. This argument would be based on the assumption that, if permission to require "membership" under § 8(a)(3) of the Act includes the lesser permission to provide the alternative of "membership" or "fee payments," then the States' power to prohibit agreements requiring "membership" under § 14(b) should similarly include the lesser power to prohibit the alternative of "membership" or "fee payments." While this argument is facile, it is predicated on patently unsound assumptions.

The first and complete answer to this argument is that the policies of §§ 8(a)(3) and 14(b) are dis-

tinctly different. Section 8(a)(3) sets forth the "permissive limits"[38] of union security allowed under the Act, and it exhibits no hostility to other forms of union security which require less of employees than compulsory membership. Surely, for example, a contract would be lawful under § 8(a)(3) if it required employees to become union members within 100 days after their initial employment rather than 30 days.

On the other hand, § 14(b) does not set forth the "permissive limits" of state power at all. This section merely authorizes the states to create a single, narrow exception to Congress' comprehensive regulation of labor relations in interstate commerce. Thus, § 8(a)(3) is a permissive section, which permits the parties to experiment and to choose between a variety of arrangements to finance collective bargaining functions which require no more of employees than compulsory membership, while § 14(b) is a limited exception to the uniform federal policy, which does not permit the States to expand their power in a way which might create conflicts with the substantive and procedural power of the Board in its administration of the Act.

Schwegmann Bros. v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951), illustrates the principle that, when Congress permits the States to establish exceptions to a uniform plan of regulation, the words of the exception must be given "their normal and customary meaning." *Id.* at 388.

Schwegmann Bros. dealt with the Miller-Tydings Act of 1937 which amended § 1 of the Sherman Act to permit the States to legalize "contracts or agreements

[38] *Keystone Coat, Apron & Towel Co.*, 121 NLRB 880, 884 (1958).

prescribing minimum prices for the resale" of certain commodities.[39] In the absence of this specific statutory exception, such contracts or agreements would violate the Sherman Act. Louisiana enacted a so-called "non-signer" statute which provided that, once a distributor enters into a price fixing agreement with any retailer in the state, all other retailers who know of the agreement are required to sell the product at not less than the price stipulated in the agreement, even though they are not parties to the agreement. The Louisiana statute created a civil cause of action against retailers who, although not parties to such a price fixing agreement, knowingly sold products at prices below those fixed in the agreement.

The question in *Schwegmann Bros.* was whether Congress' permission to the States to enact a single immunity from the Sherman Act (i.e., to immunize "contracts and agreements" to fix prices) similarly authorized the States to immunize agreements which bound non-signing retailers to such agreements. Holding that the immunity created by the Miller-Tydings Act was "a limited immunity," the Court said that the "omission of the non-signer provision from the federal law is fatal to respondents' position unless we are to perform a distinct legislative function by reading into the Act a provision that was meticulously omitted from it." *Id.* at 388. The Court concluded, *id.* at 395:

> "In other words, . . . it would seem that if the nonsigner provision as well as the 'contract' provision of state law were to be written into federal law, the pattern of the legislation would have been different.

[39] 50 Stat. 693, 15 U.S.C. § 1.

> "We could conclude that Congress carved out the vast exception from the Sherman Act now claimed, only if we were willing to assume that it took a devious route and yet failed to make its purpose plain."

In the case at bar, just as in *Schwegmann Bros.*, the Florida court's view of § 14(b), an exception to the comprehensive scheme of regulation of interstate labor relations, requires the assumption that Congress "took a devious route and yet failed to make its purpose plain." There is nothing in the legislative history, as pointed out above, to suggest that Congress intended to permit the States to convert a narrow exception into a broad field of state regulation. Indeed, the legislative history is precisely to the contrary.

The Court has often said that exceptions to broad, federal regulatory acts should be read carefully and exactly. In *A. H. Phillips* v. *Walling*, 324 U.S. 490, 493 (1945), for example, the Court said:

> "To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretive process and to frustrate the announced will of the people."

This is merely an expression of the basic rule of statutory interpretation that "exceptions from a general policy which the law embodies should be strictly construed." *Spokane & Inland R. Co.* v. *United States*, 241 U.S. 344, 350 (1916); *Piedmont & Northern R. Co.* v. *Interstate Commerce Commission*, 286 U.S. 299, 311-312 (1932).

The Court should, therefore, reverse *General Motors* because the Sixth Circuit misconstrued the policies of

§ 8(a)(3), and it should similarly reverse *Schermerhorn* because it failed to give the words of § 14(b), an exception to uniform federal policy, "their normal and customary meaning" and further because it grossly misconstrued the policy of § 14(b).

VII. THIS COURT'S DECISION IN ALGOMA PLYWOOD IS NO BARRIER TO REVERSAL OF THE INSTANT CASE, FOR IT WAS DECIDED ON DIFFERENT FACTS, IN A DIFFERENT CONTEXT, AND PRINCIPALLY ON A DIFFERENT STATUTE.

Both the court below and other state courts have read *Algoma Plywood & Veneer Co.* v. *Wisconsin E.R.B.*, 336 U.S. 301 (1949), as "sanction(ing) state regulation of union security agreements impinging on state right to work laws" (R. 26), without regard to the substantive content of the "union security agreement." This reading is erroneous.

Algoma sustained state court jurisdiction to remedy the discharge of an employee under a "maintenance of *membership*" agreement which had been executed in violation of a Wisconsin statute prohibiting agreements encouraging "membership" in a union, without prior approval by two-thirds of the affected employees in a secret ballot election. 336 U.S. at 303-304. Because the contract there had been adopted in violation of the state statute, the Wisconsin Board ordered the employer to cease "requiring as a condition of employment that any employee become or remain a member of the union." *Wisconsin E.R.B.* v. *Algoma P. & V. Co.*, 252 Wis. 549, at 553, 32 N.W. 2d. 417, at 419 (1948).

The discharge in *Algoma* occurred before the enactment of Taft-Hartley, but the state court judgments were entered after its passage. This Court's main concern, therefore, was whether the Wagner Act "gave affirmative protection to the employer in discharging

an employee under a union-security agreement for failure to maintain union *membership.*" 336 U.S. at 305 (Emphasis added.). Based on the legislative history, the Court concluded that the sponsors of the Wagner Act did not mean "to deny effect to State policies inconsistent with the unrestricted enforcement of union-shop contracts." 336 U.S. at 306. Moreover, the Court said that it was unnecessary to consider whether the States had been preempted of the power of "concurrent" regulation over labor relations in commerce "so long as Congress has not manifested an unambiguous purpose that it should be supplanted." 336 U.S. at 312.

The Wagner Act, unlike Taft-Hartley, did not undertake comprehensive regulation of union security agreements, and it contained no union unfair labor practices at all. There was no preemption by federal law under the Wagner Act, therefore, because Congress had not there comprehensively legislated in the field.

Turning to the question of whether the Taft-Hartley Act after 1947 retroactively deprived the state courts of power to regulate a union membership requirement, the Court referred to § 14(b), intending mainly to answer a specious argument made by the petitioner. The Court said of § 14(b), 336 U.S. at 314:

> "It is argued, however, that the effect of this section is to displace State law which 'regulates' but does not wholly 'prohibit' agreements requiring membership in a labor organization as a condition of employment. But if there could be any doubt that the language of the section means that the Act shall not be construed to authorize any 'application' of a union-security contract, such as discharging an employee, which under the

> circumstances 'is prohibited' by the State, the legislative history of the section would dispel it."

At most, therefore, this Court has said that § 14(b) authorizes the States to remedy a discharge which constitutes an application of an agreement requiring "membership" in a union. Compare *Plankington Packing Co.* v. *Wisconsin Employment Relations Board*, 338 U.S. 953 (1950) (memorandum).

Recent preemption decisions of the Court striking down state court *applications* of right-to-work laws to picketing suggest that the *Algoma* case was never intended to authorize the States to apply their right-to-work laws indiscriminately to contracts and conduct in commerce where it is "arguable" that the N.L.R.B. has primary jurisdiction. See *Construction Laborers* v. *Curry*, 31 U.S. L. Week 4143 (U.S. 1963); *Electrical Workers* v. *Farnsworth & Chambers*, 353 U.S. 969 (1957) (memorandum).

Notwithstanding the narrow facts on which the *Algoma* decision was based, the state courts have relied upon one *obiter dictum* in *Algoma* as authorizing the States to proscribe service fee arrangements under § 14 (b):

> "Other provisions of the Taft-Hartley Act make it even clearer than the National Labor Relations Act that the States are left free to pursue their own more restrictive policies in the matter of union security agreements." 336 U.S. at 313-314.

This dictum preceded the Court's reference to § 14 (b), and for this reason the Kansas Supreme Court, for example, has said that *Algoma* definitively interpreted § 14(b) as confirming state court jurisdiction to "pursue their own more restrictive policies," including the

prohibition of service fees. *Higgins* v. *Cardinal Mfg. Co.*, 188 Kan. 11, at 29, 360 P. 2d 456, at 469 (1961). This is an unwarranted reliance, for in the context of *Algoma* the dictum means only that § 14(b) authorizes the States to pursue union-security policies which are "more restrictive" than the membership requirement authorized by federal law. In other words, the Court merely said that the States may prohibit "membership" which is a union security policy more "restrictive" than the § 8(a)(3) authorization. Surely this single dictum cannot support the Florida court's view that federal regulation by the Labor Board must give way to state court jurisdiction whenever a state asserts that its right-to-work law governs conduct or a contract in commerce.

Did Congress intend by § 14(b) to authorize the states to exercise this kind of life-and-death control over labor relations in commerce? The *Algoma* case surely did not decide this question. An examination of the scheme of the whole statute compels a negative answer, for Congress did not alter the bed-rock national labor policy to eliminate "obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining" when it enacted § 14(b). Section 1, 29 U.S.C. § 151. The Court's language in striking down another Florida statute, which sought to license union representatives, is equally applicable to Florida's regulation of the instant contract: It " 'stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress,' " which "cannot be created consistently with the Federal Act." *Hill* v. *Florida*, 325 U.S. 538, 542-543 (1945).

CONCLUSION

For the reasons set forth above, the judgment of the Supreme Court of Florida should be reversed and vacated.

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APPENDIX A

Section 8(a)(3) of the National Labor Relations Act, 61 Stat. 15, 29 U.S.C. § 158(a)(3), provides as follows:

It shall be an unfair labor practice for an employer . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with any labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than

> the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; . . . .

Section 14(b) of the National Labor Relations Act, 61 Stat. 151, 29 U.S.C. § 164, provides as follows:

> Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

Section 12 of the Declaration of Rights of the Florida Constitution, § 12, 25 Fla. Stat. Ann., provides as follows:

> The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union, or labor organization; provided, that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

NO. 368

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL 1625, AFL-CIO, ET AL., *Petitioners*

v.

ALBERTA SCHERMERHORN, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

NO. 404

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

GENERAL MOTORS CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, hereby respectfully move for leave to file a joint brief as *amici curiae* in support of petitioners in No. 368 and in support of petitioner in No. 404, as provided for in Rule 42 of the Rules

of this Court. The consent of the attorneys for the petitioners in No. 368 has been obtained. The consent of the Solicitor General has been obtained in behalf of the petitioner in No. 404. The consent of the attorneys for the respondents in No. 368 and No. 404 was requested but refused.*

The AFL-CIO is primarily a federation of national and international labor organizations having a total membership of approximately thirteen million. The local union which is a petitioner in No. 368 is affiliated with one of the international labor organizations in the Federation. The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, also an affiliate of the Federation, filed the unfair labor practice charges involved in No. 404. No. 368 presents the question whether collective agreements requiring nonunion employees to pay service fees to their bargaining representatives are subject to prohibition by the states. No. 404 presents the question whether collective agreements requiring employees to become union members or to pay the equivalent of union fees and dues are valid as a matter of federal law. The issues are thus distinct but interrelated. Both are of the utmost significance for the American labor movement. The AFL-CIO, as the principal spokesman for the organized workers of this country, and the UAW with its special interest as the charging party in one of the cases, desire the opportunity to present their views on these issues to the Court.

Petitioners in the two cases, whose positions the AFL-CIO and the UAW are supporting, will naturally concentrate on the individual question presented by their own particular case. For American labor, however, it will be of little lasting value if only one of the judgments below is

* The pertinent correspondence has been submitted to the Clerk of the Court.

reversed. We therefore think it vital that a single brief be placed before this Court treating both cases together and showing that the proposed contractual arrangement at issue in No. 404 is valid under federal law, that the executed agreement at issue in No. 368 is beyond the reach of prohibitory state law, and that those two propositions are supported by the congressional purpose in enacting the relevant provisions of Taft-Hartley and by the demonstrated needs of sound national labor policy. Tendered with this motion is a brief following that approach. We feel our presentation should assist the Court in viewing the questions posed by the two cases with a greater awareness of their interrelationship and of their importance to American labor.

Respectfully submitted,

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January 1963

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW AS AMICI CURIAE

INTEREST OF AMICI CURIAE

This joint brief *amici curiae* is tendered for filing by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and by the International Union,

United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, contingent upon the Court's granting the Motion for Leave to File a Brief as Amici Curiae.

The AFL-CIO, a federation of national and international unions having approximately thirteen million members, is the principal spokesman for organized working people in this country. The UAW filed the unfair labor practice charges involved in No. 404. That case presents the question whether collective bargaining agreements requiring employees to become union members or to pay the equivalent of union fees and dues are valid as a matter of federal law. No. 368 presents the question whether collective agreements requiring nonunion employees to pay service fees to their collective bargaining representative are subject to prohibition by the states.

These questions, which are of the utmost concern to American labor, are logically distinct but they should be considered together. Petitioners in the two cases at bar will naturally concentrate on the issues in their own particular case. There is need for a single brief treating the issues of both cases in light of their interrelationship, and demonstrating that the proposed agreement at issue in No. 404 is valid as a matter of federal law, and that the executed agreement at issue in No. 368 is not subject to state control. The AFL-CIO, speaking for the main body of the labor movement, and the UAW, the charging party in one of the cases, are thus vitally interested in the validity of contractual arrangements which have become a practical necessity if unions throughout the country are to be assured of the means of fulfilling their federal statutory responsibility of fair representation.

SUMMARY OF ARGUMENT

I

The permission contained in section 8(a)(3) of the National Labor Relations Act for union shop agreements includes permission for agency shop agreements, because any other conclusion makes a mockery of common sense. Agreements requiring employees to become union members are expressly lawful under the statute. It would be a tortured construction to say that agreements nevertheless are unlawful when they give employees the option either to become union members *or* to pay fees equal to members' fees and dues. The addition of the extra option cannot make invalid an otherwise valid provision.

This is especially so since other contractual arrangements not requiring membership absolutely, such as maintenance of membership agreements, are permitted by the Act. Furthermore, under existing precedents even a union shop clause cannot be enforced through the discharge of an employee who tenders fees and dues but refuses to become a member. The agency shop has served as a compromise solution in numerous union security disputes and should be preserved.

II

Section 14(b) of the Act gives the states the power to forbid agreements requiring union "membership." This does not include the power to forbid an agreement which gives employees the option of meeting the contract's requirements by paying fees instead of by becoming union members. Such a conclusion is not just in accord with the language of the statute; it is in accord with the intent of Congress.

In dealing with the problem of "compulsory unionism" in the Taft-Hartley Act in 1947, Congress was not con-

cerned about the payment of nondiscriminatory, nonexcessive fees to labor organizations. It was concerned about abuses associated with union *membership* requirements—about the exclusion of employees from jobs because they were arbitrarily denied admission to membership and about the removal of employees from jobs because they were arbitrarily expelled from membership. The solution of Congress was to regulate the requirement of *membership* as a matter of federal law, and to leave the question of further regulation or outright prohibition of the requirement of *membership* in the hands of the states. Neither the vice nor the cure was seen in terms of fee payments divorced from compulsory membership.

Allowing the states to regulate more than the requirement of membership would invite further encroachments on federal labor policy through state regulation or prohibition, already beginning, of the exclusive hiring hall or even of the status of a majority union as exclusive bargaining representative. State regulation must be limited to the one area allowed by section 14(b)—agreements requiring "membership."

III

Even if this Court should eventually decide that the states under section 14(b) may properly prohibit agreements requiring nonunion employees to pay fees equal to members' fees and dues, on the ground that such agreements are *in fact* equivalent to agreements requiring membership, this question is not now before the Court in *Retail Clerks Local 1625* v. *Schermerhorn*, No. 368. For the agreement at issue here, by its terms, requires of nonunion employees only the payment of a service fee to help defray the union's collective bargaining costs.

Such a fee, if fairly apportioned, does not amount to an

encouragement of union membership, because it merely represents the pro rata cost of the benefits received by an employee as a result of the union's services. It is precisely in accord with the expressed congressional purpose of eliminating "free riders." It completely lacks any element of compulsion on dissenters to associate with an organization against their will. It partakes in no way of union "membership." It is a practical necessity if a union is to fulfill its obligation under the statute to represent fairly all the employees in the bargaining unit. The validity of such a service fee, like the validity of a reasonably apportioned registration fee charged nonunion applicants using a union's exclusive hiring hall, or like the validity of any similar fee, should be entirely a matter for initial decision by the NLRB applying uniform national law and policy, and not a matter for the states applying their own individual and differing laws and policies.

ARGUMENT

I. The Permission In Section 8(a)(3) Of The National Labor Relations Act For Agreements Requiring Union Membership Includes Permission For Agreements Requiring Either Union Membership Or The Alternative Option Of Fees Payments.

A. The Common Sense of the Statute

It is axiomatic in interpreting statutes that a "literal reading of them which would lead to absurd results is to be avoided.". Stone, J., speaking for the Court in *Haggar Company* v. *Helvering*, 308 U.S. 389, 394. The first proviso to section 8(a)(3) of the National Labor Relations Act, 61 Stat. 140 (1947), as amended, 29 U.S.C. §158(a)(3), expressly permits an employer to make an agreement with a labor organization "to require as a condition of employment membership therein on or after the thirtieth day following

the beginning of such employment or the effective date of such agreement, whichever is the later * * *." *NLRB* v. *General Motors Corp.*, No. 404, presents the question whether that permission includes permission for an agreement requiring as a condition of employment on or after the thirtieth day *either* union membership *or*, at the employee's own option, the payment of fees and dues equal to the regular union fees and dues.

Only an artificially literal reading of the statute could hold that its permission does not extend to an agreement which imposes the precise requirement allowed by the statute, simply because the agreement adds that an employee has the choice of paying fees and dues as an alternative to joining the union. For us the test is a simple one: section 8(a)(3) at the very least protects an agreement which by its terms makes plain to an employee that he can comply with its requirements by doing *exactly* what section 8(a)(3) allows an employer and a union to require of employees. If that test is met, it becomes irrelevant, viewed purely as a matter of federal labor law, whether the employee is given the option of complying with the agreement's requirements by doing something else.[1]

B. Legislative Intent

An agreement giving the optional requirement of membership or equivalent payments falls within the plain intendment of the statutory language. For section 8(a)(3) does no more than set the outer limit of what a collective bargaining agreement may provide in the way of union security.

Indeed, it will hardly be denied that section 8(a)(3) does permit something less in the way of union security than requiring membership by all employees on or after the

[1] We assume that the alternative option involves no conduct itself unlawful, which might cause problems not here present.

thirtieth day. No one is likely to contend, for example, that the General Motors Corporation and the Ford Motor Company are violating the law by incorporating in their standard union contracts provisions requiring union membership "within ten days" after the thirtieth day.[2] Nor would it be suggested that there is an infirmity in the "maintenance-of-membership" clauses which are included in some five percent of the collective bargaining contracts throughout the country.[3] See *Krause Milling Co.*, 97 NLRB 536 (1951). Yet such clauses do not require union membership as a general condition of employment, but simply require that union membership be maintained by those employees who belong to the union when the contract is executed or who voluntarily join it thereafter.

Since a collective bargaining agreement may thus provide something less than a requirement of membership on or after the thirtieth day for all employees covered by an agreement, it follows inexorably that section 8(a)(3) only provides an outer limit of union security and not the sole form of union security permissible. The agency shop—omitting as it does from the requirement of membership those who choose to make equivalent support money payments—falls squarely within that perimeter.

The court below hardly addressed itself to this problem. In holding the agency shop invalid under section 8(a)(3), it simply pronounced its *ipse dixit* that an agency shop arrangement is "different" from a union shop and not something "lesser" (R. 114). But whether one calls the agency shop lesser or different from a union shop, the simple fact is that the agency shop does provide *greater choice* to the

[2] See 1 CCH Union Contracts—Arbitration ¶¶ 59,905.04, 59,923.006.

[3] See 46 LRRM 14, 18 (1961) (based on a survey by the Bureau of National Affairs of 400 representative contracts in effect as of mid-1960).

employee than does the union shop—it gives him the option of being a union member or not being a member, which the union shop does not. Since Congress deemed the union shop a permissible restriction on the employee's freedom of choice, there could be no conceivable reason for striking down an arrangement which gives the employee the additional choice of making equivalent payments without joining the union.

To interpret the Act as permitting the union shop and prohibiting the agency shop is "to infer Congressional idiosyncrasy." *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U.S. 381, 393. And in this instance, it is all the more far-fetched to infer congressional idiosyncrasy because the legislative history of the Act is clear that lesser forms of union security, including the agency shop, were intended to be permissible under section 8(a)(3).

With respect to both the Wagner and Taft-Hartley Acts, Congress evidenced an intent that the union security provision merely mark the outer limit of the permissible; and in the case of the Taft-Hartley Act Congress explicitly intended to permit the agency shop. The Senate Committee Report on the Wagner Act expressly states that "the bill does nothing to facilitate closed-shop agreements or to make them legal in any State where they may be illegal; it does not interfere with the *status quo* on this debatable subject but *leaves the way open to such agreements as might now legally be consummated* * * *." S. Rep. No. 573, 74th Cong., 1st Sess., pp. 11-12 (1935). (Emphasis added.) In the case of the Taft-Hartley Act, Senator Taft himself, in explaining section 8(a)(3), referred to the agency shop which had developed in Canada, under which, as Senator Taft put it, "If he pays the dues without joining the union, he has the right to be employed." 93 Daily Cong. Rec. 5088 (May 9, 1947), 2 Legislative History of the Labor Manage-

ment Relations Act [hereinafter cited "Leg. Hist."] 1422. And, as also stated by Senator Taft during the debate: "• • • what we do, in effect, is to say that no one can get a free ride in such a shop. • • • The employee has to pay the union dues." 93 Daily Cong. Rec. 3953 (April 23, 1947), 2 Leg. Hist. 1010. This Court summed up the legislative history in *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 41: "Thus Congress recognized the validity of unions' concern about 'free riders' • • •." The failure of the court below to take note of that congressional concern with "free riders" led it to its irrational conclusion.

C. The Structure and Operation of §8(a)(3)

The decision below is even more incompatible with the overall scheme of section 8(a)(3) than it is with the language validating the union shop. For, while the first proviso to section 8(a)(3) permits employers and unions to enter into union shop agreements, under existing Labor Board precedents the second proviso of section 8(a)(3) does not permit enforcement of such union shop agreements by discharge of nonmember employees who tender dues and initiation fees. In other words, while section 8(a)(3) permits a union shop clause to be written into a collective bargaining agreement, as currently interpreted it only permits the discharge of those who do not pay dues and initiation fees, which from the standpoint of enforcement amounts to the same thing as an agency shop. The decision of the court below thus accomplishes the incongruous result that a clause providing for a union shop which presently may be enforced by discharge only as an agency shop is legal, but a clause providing for an agency shop is illegal.

The actual operation of section 8(a)(3) is illustrated by the decisions of the NLRB in *Union Starch and Refining Co.*, 87 NLRB 779 (1949), *enforced* 186 F.2d 1008 (7th Cir. 1951), *cert. den.* 342 U.S. 815, and *Marlin Rockwell Corp,*

114 NLRB 553 (1955). In *Union Starch* the Board, basing its decision on part (B) of the second proviso to section 8(a)(3), found both the union and the employer guilty of unfair labor practices, on the ground that discharged employees had been denied union membership for reasons other than failure to tender dues and initiation fees, i.e., for refusing to take the union oath. In *Marlin Rockwell* the Board held it an unfair labor practice for a union to invoke a maintenance of membership clause against employees who, while they continued to pay dues, had voluntarily resigned their union membership. The Board, following the reasoning of *Union Starch*, concluded that membership terminated by voluntary resignation was, in the language of clause (B) of section 8(a)(3), "membership * * * terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees," and, therefore, not a permissible ground for discharge.

We have serious reservations about the rationale of these decisions, and about the result in *Marlin Rockwell* especially. Regardless of this, however, it is clear that a union shop clause may be enforced by way of job sanctions as if it were an agency shop clause, and under existing precedents may only be so enforced.

The court below did not discuss these decisions, or any other decisions, or the effect of the second proviso to section 8(a)(3). In its cursory denial of the Board's request for enforcement the court simply noted that section 8(a)(3) speaks in terms of "membership" "as a condition of employment" and declared that the "agency shop arrangement" is not the same thing. The court ignored the fact that while the first proviso to section 8(a)(3) speaks in union shop terms, i.e., "membership" "as a condition of employment," the second proviso, and particularly part (B) thereof, imposes additional restrictions on the imple-

mentation of the union shop which may equate the type of union security arrangement enforceable under the statute to an agency shop.

Thus it is anomalous to hold, as did the court below, that an outright agency shop provision is illegal. It can hardly be the law that to be valid a union security provision must first provide for a union shop, using the language of the first proviso to section 8(a)(3), and then limit it to, in effect, an agency shop, by incorporating the restrictions of the second proviso. The Act does not set forth a model union security clause for incorporation in contracts, and say that only it shall be valid, nor does it confer on the Board, or the court below, any power to devise and require the use of such a model provision. *Teamsters Local 357* v. *NLRB*, 365 U.S. 667, 676-677.

The court below apparently also failed to comprehend the distinction between a union security provision under which employees are given the option of joining the union or paying the equivalent of initiation fee and dues while remaining outside of the union, and a provision which accords no option of joining. The court's opinion leaves the impression that the union was seeking an arrangement of the latter type.[4] But the decision of the Board unequivocally declares:

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[4] The court's opinion states: "The Union made a demand in writing that the employer bargain with respect to its proposal that the existing National Agreement between the parties be supplemented so as to require as a condition of continued employment that all employees not already members of the Union, and new employees hired thereafter at the employer's Indiana locations must pay to the Union within thirty days after the agreement or of their initial employment, whichever is later, a sum equal to the initiation fee charged members of each of Union's locals and monthly sums equal to the regular membership dues required of its locals' members at each location. This type of arrangement is called an 'agency shop'" (R.111).

> "Second, there is no suggestion made anywhere in this proceeding that membership in the Union is not available to any nonmember employee who wishes to join. Everyone concedes that the Union was not seeking to bargain over a clause requiring nonmember employees to pay sums equal to dues and fees as a condition of employment while at the same time maintaining a closed-union policy with respect to applicants for membership" (R. 60).

The distinction, at best ignored by the court below, may well be crucial, for it would appear, and the union has never urged otherwise, that a provision requiring the payment of initiation fees and dues without an option of joining the union would indeed be invalid, since membership would not be available "on the same terms and conditions" applicable to others, as called for by the second proviso to section 8(a)(3). But where, as here, membership is available to all on equal terms, the option of nonmembership can hardly result in invalidity.

D. Public Policy

Prior to its decision in the instant case, the NLRB upheld the legality of the agency shop in *Public Service Company of Colorado*, 89 NLRB 418 (1950), decided under the Wagner Act, and in *American Seating Company*, 98 NLRB 800 (1952), decided under the Taft-Hartley Act. Relying upon these decisions, the Federal Mediation and Conciliation Service has distributed a report on the agency shop for the use of its staff which not only sets forth various forms of agency shop clauses, but asserts the legality of these clauses.[8]

In the years since these decisions agency shop clauses have been included in numerous collective bargaining agreements. A survey by the Bureau of National Affairs

[8] See Federal Mediation Service, *The Agency Shop* 25 (1959).

of 400 representative union contracts in effect as of mid-1960 disclosed that "[a]gency-shop clauses are now included in 6 percent of contracts, up from 1 percent in 1957."[6]

Despite certain limitations, the agency shop has served over the years as a useful compromise solution for disputes over union security. Employers who have taken the position that they were unwilling, as a matter of principle, to enter into an agreement requiring employees to join a union which they might object to joining, have sometimes been willing to compromise upon an agency shop, which requires employees to contribute to the financial support of the union, but gives them the option whether to join. A recent compromise settlement of this sort is the agreement entered into in July 1962 between Douglas Aircraft Company, the United Automobile Workers, and the International Association of Machinists. The aircraft manufacturers had over the years resisted any sort of union security arrangement, but as part of the July settlement Douglas Aircraft agreed to an agency shop.[7]

The agency shop compromise has sometimes, according to *Fortune Magazine*, even served the interests of management. *Fortune* states:

> "In some cases the agency shop served a special management purpose. For several years before 1952, Western Union had a union-shop provision in its contracts covering 30,000 employees. In that year there was a bitter strike during which some union members crossed the picket line and returned to work. Fearing that these people would be expelled from the union as a result and therefore lose their jobs, Western Union refused to accede again to the union shop and compromised instead on an agency shop."[8]

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[6] 46 LRRM 14, 18 (1961).

[7] *N. Y. Times*, July 17, 1962, p. 1, col. 1.

[8] "The Agency Shop," *Fortune Magazine*, January 1961, p. 176.

The agency shop has also sometimes been used by unions to meet the objections of persons who refuse on religious grounds to join unions, and here too the compromise role of the agency shop has been constructive.* Plainly, it serves no useful purpose to require, as does the decision below, that unions must either (1) agree that religious objectors actually join the union, on pain of discharge for refusal, or (2) forego agreeing that religious objectors pay their share of the unions' costs.

Only the clearest statutory language and legislative history would justify (1) overruling the long-standing Board decisions upholding the agency shop under both the Wagner and Taft-Hartley Acts, (2) invalidating the large number of existing agency shop agreements, and (3) depriving both management and labor of this compromise solution to disputes over union security. Far from there being any such language and history, every indication of congressional intent supports the validity of the agency shop as a reasonable means of resolving labor-management conflicts in this area.

Sensible solutions to the union security issue are difficult enough to arrive at without outlawing one—the agency shop—that has already proven its value. The kind of agreement proposed by the union in *General Motors* should therefore be sustained under federal law. It remains for us to show that the kind of agreement at issue in *Retail Clerks Local 1625* v. *Schermerhorn*, No. 368, is beyond the power of a state to prohibit.

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* *E.g.*, the contract between Local 135, UAW, and American Seating Company, Grand Rapids, Michigan, provides for a union shop except that objectors on religious grounds must pay a monthly fee in the same amount as the dues into the local union welfare fund. See *American Seating Company*, 98 NLRB 800, 801 (1952).

II. Section 14(b) Of The National Labor Relations Act Does Not Authorize States To Prohibit Or Regulate Union Security Agreements Which Do Not Require Union Membership As A Condition of Employment.

A. Federal Preemption and §14(b)

Absent some special factor, the doctrines of federal preemption and primary jurisdiction would foreclose the states entirely from dealing with the subject of union security in industries affecting commerce. For it is established that when an activity is "arguably subject" to the federal labor law, the states "must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 245. See also *Garner* v. *Teamsters Local 776*, 346 U.S. 485; *Weber* v. *Anheuser-Busch*, 348 U.S. 468. The arguable subjection of union security arrangements to sections 7 and 8 of the National Labor Relations Act needs no elaboration; the issue presented in the case at bar, *NLRB* v. *General Motors Corp.*, No. 404, provides an ample demonstration.

The special factor relied on by respondents in *Retail Clerks Local 1625* v. *Schermerhorn*, No. 368, in an effort to justify insulating from the preemption doctrine a state's prohibition of collective bargaining agreements requiring employees to pay service fees to their bargaining representative, is of course section 14(b) of the NLRA. Section 14(b) provides:

> "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring *membership* in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law." (Emphasis added.)

Professor Charles Black of Yale has remarked in another context that "[s]implicity is out of fashion" in legal reasoning, prefatory to his setting forth a scheme of reasoning which he conceded was "awkwardly simple."[10] We find ourselves similarly disadvantaged. "Membership in a labor organization" as used in the Act signifies "adhesion to union membership" and "participation in union activities." See *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 39-40; *cf. Webster's Third New International Dictionary* (1961) ("membership * * * the state or status of being a member"). In our view a union contract whose requirements can be met by employee payments of fees to a labor organization, whether it be called an "agency shop" arrangement or something else, is simply not an agreement requiring union "membership" within the meaning of section 14(b). Whatever may be its status as a matter of federal law, therefore, such an agreement is not subject to state regulation. As Justice Stone has said on behalf of this Court: "While for the purposes of judicial decision dictionary definitions often are not controlling, they are at least persuasive that meanings which they do not embrace are not common." *Aschenbrenner* v. *United States Fidelity & Guaranty Co.*, 292 U.S. 80, 85.

Highly practical considerations support our view that the states lack the power to legislate regarding union security agreements which do not go so far as to require union membership in the full sense of the word. For the inevitable tendency of state "right-to-work" laws, if not kept within the strict bounds of literal membership, is to expand to cover practices clearly valid under federal law, and often having nothing to do with union membership as

[10] Black, "The Lawfulness of the Segregation Decisions," 69 Yale L. J. 421 (1960).

such. Thus, South Carolina and Arkansas have applied their right-to-work laws to outlaw the exclusive hiring hall.[11] *Branham* v. *Miller Electric Co.*, 237 So. Car. 540, 118 S.E. 2d 167 (1961); *Kaiser* v. *Price-Fewell, Inc.*, 359 S.W. 2d 449 (Ark. Sup. Ct. June 4, 1962), *cert. den.* Jan. 7, 1963, No. 612.[12] Iowa has used its right-to-work statute to regulate the check-off. See [1956] *Iowa Atty. Gen. Op.* 188, Sept. 16, 1955, 1 CCH LRR-State Laws, Iowa ¶46, 565.45. And Louisiana and South Dakota have taken the ultimate, but in a perverse way completely logical, step of interpreting their right-to-work laws as prohibiting unions from being the exclusive bargaining representatives in units containing dissenting employees. *Piegts* v. *Meat Cutters Local 437*, 228 La. 131, 81 So. 2d 835 (1955); [1957-58] *So. Dak. Atty. Gen. Op.* 236, Sept. 3, 1958, 43 LRRM 73 (1959). If one should accept the notion that under section 14(b) the states may regulate "compulsory unionism" in any broader sense than some form of membership requirement, it would become extremely hard to say that as a realistic matter anything could be more compulsive than a union's exclusive bargaining power. The power to compel, in agreement with an employer, the payment of relatively small fees is as nothing compared to the power to fix, in agreement with an employer, an employee's wages, his working hours, and every single other negotiable term and condition of his industrial existence. Yet national labor policy has long recognized the necessity for the latter kind of union authority. See, *e.g.*, *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33. To prevent an intolerable intrusion of state policy into the realm of federal policy, the bounds of a

[11] Nondiscriminatory exclusive hiring halls are of course lawful under federal law. *Teamsters Local 357* v. *NLRB*, 365 U.S. 667.

[12] Examination of the petition for certiorari and the record in this case indicates that the question of federal preemption was not properly raised in the state courts.

state's authority over "membership" requirements cannot be measured by resort to a standard so imprecise that it takes in everything which might conceivably be termed "compulsory unionism."

We have previously argued the NLRB was correct in holding in *General Motors* that a clause giving employees the option of joining a union or paying certain fees to it was permissible under the proviso to section 8(a)(3), which allows agreements requiring "membership" in a labor organization as a condition of employment. At first blush there may appear to be an inconsistency between that position and our position on the limited power of the states under section 14(b). But there is none. It can readily be shown that our interpretations of the two sections are logically consistent. More important, the legislative history behind section 8(a)(3) and section 14(b) confirms that our interpretations reflect the real congressional purpose in enacting each of those provisions. As we will show, our view of the two sections also best comports with the line of decisions by this Court which have shielded national labor policy against unauthorized encroachments by the states.

B. The Different Functions of the Same Terminology in §8(a)(3) and in §14(b)

Our interpretation of section 14(b) is met at the outset with a simple semantic argument. Its starting point is the use of the same terms, agreements requiring union "membership," in section 8(a)(3)'s first proviso and in section 14(b). Under the 8(a)(3) proviso Congress allowed agreements requiring "membership." The NLRB in *General Motors* interpreted this permission to include permission for an agreement requiring either membership or the payment of fees by employees as an alternative to membership. In section 14(b) Congress allowed the states to prohibit agreements requiring "membership." To be logically

consistent, so goes the argument, one must concede that Congress was allowing the states to prohibit the same type of agreement permissible under the section 8(a)(3) proviso, *viz.*, an agreement requiring either membership or the payment of fees as an alternative to membership. That argument overlooks the utterly different functions served by the same terms in the two sections of the statute.

In section 8(a)(3)'s first proviso Congress used the terminology of requiring "membership" to delimit the maximum form of union security *permissible* as a matter of federal law. The Labor Board has therefore correctly included less restrictive forms within the boundaries of what was permissible. As long as the choice of membership is available, the existence of alternative options becomes irrelevant as a matter of federal law. On the other hand, in section 14(b) the same language is used to delimit the maximum reach of *prohibitory* state legislation. Hence the states are not empowered to invalidate union security arrangements which do not go so far as to impose a membership requirement. And as long as employees not desiring to join a union are provided with a genuine, meaningful alternative, an agreement cannot be said to require membership. In short, while permission for the greater requirement implies permission for the lesser, the power to prohibit the greater does not imply the power to prohibit the lesser.

An illustration will make this plain. If a state government were to set a maximum *permissible* rural speed limit of 50 miles an hour, this would obviously include permission for a driver to go at the lesser speed of 35 miles an hour. But if a state were to delegate to a county the authority to *prohibit* rural speeds of 50 miles an hour, this would just as obviously *not* include the authority to prohibit a driver from going at the lesser rate of 35 miles. Similarly, under

section 8(a)(3) federal permission for a membership requirement includes permission for anything less restrictive; but under section 14(b) state prohibitions of a membership requirement may not include prohibitions of anything less restrictive.

We are most emphatically not trying to say that requiring "membership" means one thing in section 8(a)(3)'s first proviso and something else in section 14(b). In each instance we regard the term as embracing the same elements, *viz.*, the regular fees obligations, plus other membership obligations, plus membership rights. This naturally means, as the Board held in *General Motors*, that the 8(a)(3) proviso allows the lesser requirement of fees alone, as an alternative option to the full membership requirement allowed by the statute. Under section 14(b) the states may forbid a requirement of membership, but that means, just as it does in 8(a)(3)'s first proviso, the elements of fees obligations, plus other membership obligations, plus membership rights. An agreement requiring only the single element of fees (or a portion thereof) is thus not an agreement requiring union membership which the states can prohibit. As in the illustration involving the two uses of the phrase "50 miles an hour," there is nothing at all inconsistent about using the same term "membership" in one part of the statute to mark the outermost boundary of permissible union-employer conduct, and in another part to mark the innermost boundary of allowable state regulation.

C. The Distinction Between "Membership" and "Fees Payments"

Another argument against our position consists in reading the two provisos to section 8(a)(3) together and concluding that for all practical purposes the *only* kind of agreement allowed under federal law is an agency shop

type requiring the payment of fees and dues. This argument in effect would equate the term "membership" as used in the Act with the payment of fees and dues. If this equation holds under section 8(a)(3), it should hold under section 14(b). Accordingly, the states must have the power to prohibit the requirement of fees payments, since that is all "membership" as used in the statute really means. And otherwise, it is concluded, the states' prohibitory power under section 14(b) would have little meaning. This argument fails because its premise is erroneous. Neither the legislative history nor a fair reading of the statute supports the notion that Congress was using "membership" as shorthand for the "obligation to pay fees and dues."

Legislative history indicates that the majority of Congress in amending section 8(a)(3) had two primary thoughts in mind: (1) a person should not be denied a job because he was not a union member, or removed from a job because he was unfairly ousted from union membership; and (2) a person should not be allowed to be a "free rider" and gain the benefits of unionism without paying for them. See generally S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess., pp. 6-7 (1947); H. Rep. No. 245 on H.R. 3020, 80th Cong., 1st Sess., pp. 33-34 (1947).

Congress accomplished its purposes in two separate provisos to section 8(a)(3). The first proviso prescribed the standards for the type of contract that a majority union and an employer could write—and that included requiring union "membership" after thirty days. The second prescribed limits on the way such a contract could be enforced *so far as job rights were concerned*—and that excluded arbitrary discrimination as long as fees and dues were tendered. There is no suggestion, however, that the two provisos had the same scope, or that "membership" meant only tendering

fees and dues. See S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess., p. 7 (1947) ("employers would still be permitted to enter into agreements requiring all the employees in a given bargaining unit *to become members* 30 days after being hired"); 93 Daily Cong. Rec. 3951 (April 23, 1947), 2 Leg. Hist. 1009 (Sen. Taft, explaining his bill's union shop provision: "after 30 days such employee *has to join the union*"). (Emphasis added.)

Proof that the first proviso's permission for agreements requiring "membership" meant membership in the usual sense of the term, and that accordingly the word should be given the same meaning in section 14(b), is also provided by the Senate and House debates on proposed amendments to prohibit even the union shop. Senator Ball, who offered such an amendment in the Senate, argued that there should be outlawed "contracts which make *membership* in a union a condition of employment." 93 Daily Cong. Rec. 5087 (May 9, 1947), 2 Leg. Hist. 1419. (Emphasis added.) To which Senator Taft replied, not that the allowable contract could require only fees payments, but that "since there had been for such a long time so many union shops in the United States, since in many trades it was entirely customary and had worked satisfactorily, I at least was not willing to go to the extent of abolishing the possibility of a union-shop contract. * * * In the bill we say that the employee *must join the union* within 30 days after he is employed." 93 Daily Cong. Rec. 5087 (May 9, 1947), 2 Leg. Hist. 1420. (Emphasis added.) See also 93 Daily Cong. Rec. 5089 (May 9, 1947), 2 Leg. Hist. 1422-23 (Sens. Thye, Flanders, Hawkes). Similar expressions are found in the House debate on the proposal to outlaw the union shop. See 93 Daily Cong. Rec. 3612-14, 3616, 3619 (April 16, 1947), 1 Leg. Hist. 733-34, 736, 739, 745 (Reps. Hoffman, Fisher, Buck, Smith of Ohio, Jonkman).

It is true that the NLRB has held that a union shop contract cannot be enforced by *discharging* an employee who is ready to tender his fees and dues, even though he refuses to assume any other obligations of union membership. *Union Starch and Refining Co.*, 87 NLRB 779 (1949), *enforced* 186 F.2d 1008 (7th Cir. 1951), *cert. den.* 342 U.S. 815; *Marlin Rockwell Corp.*, 114 NLRB 553 (1955). It is also true that Justice Reed has said in speaking for this Court: "This legislative history clearly indicates that Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees." *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 41. With due deference, we suggest that the latter statement was far broader than the cases at hand warranted.[13] Both it and the NLRB decisions may have resulted from concentrating too much on the special safeguards against the abuse of membership requirements and ignoring the authorization for the requirements themselves. The majority in Congress wanted open unions, not open shops.

In any event, however, none of this nullifies the distinction between membership and the mere payment of fees. None of it supports the conclusion that membership in sections 8(a)(3) and 14(b) means only fees payments, and that con-

[13] The *Radio Officers* decision dealt with three separate cases. One involved an employee whose seniority was reduced because he was late in paying union dues; there was no valid union security clause in existence. In the second case a union refused to let a company hire a member who had failed to seek union "clearance" before accepting a job offer; no union security arrangement applied. The third case involved disparate wage treatment for union members and nonmembers in the same bargaining unit; no union security agreement was at issue. In each of these cases the real question was whether there was "discrimination * * * to encourage * * * membership" within the general prohibition of sec. 8(a)(3), not whether there was unauthorized "utilization" of a valid union security clause.

sequently the states must have the power to prohibit a fee requirement. For regardless of the extent to which a union shop may be enforced, no one suggests that an otherwise valid contract becomes unlawful under section 8(a)(3) because by its terms it requires "membership" in a labor organization. And the plain fact is that a union shop contract so worded as to require membership has the practical effect of enlisting nearly all new employees into full-fledged union membership. As one commentator has remarked, "True, such 'literal' membership is unenforceable, but the psychological weight of the words themselves is significant." [14] This is highly desirable for a union simply as a means of promoting employee participation and loyalty.[15]

A contract requiring membership in terms also may have, at least indirectly, significant legal consequences. Once enrolled as a member, an employee becomes subject to the union constitution, which state courts have held is a legally binding contract between union and member. State courts, for instance, have enforced the collection of fines that have been imposed on a member for just cause. See, *e.g.*, *Auto Workers Local 756* v. *Woychik*, 5 Wis. 2d 528, 93 N.W.2d 336 (1958).

The first proviso to section 8(a)(3) thus gives unions a broader legal right than the second proviso allows them to enforce by way of job sanctions. The first proviso is phrased in terms of "membership" and encompasses not only the obligation of paying fees and dues but all the other privileges and responsibilities customarily associated with the

[14] Graves, "The Agency Shop vs. The 'Right to Work'," 40 Tex. L. Rev. 542, 552 (1962).

[15] *Cf.* Jones, "The Agency Shop," 10 Lab. L.J. 781, 789 (1959) ("The agency shop weakens the union movement and the union position in dealing with the employer because a greater number of employees do not take part in the running of union affairs and activities").

concept of membership. The second proviso, as now interpreted, is restricted to the obligation of paying fees and dues. When Congress used the term "membership" in section 14(b) in exempting certain state laws from the reach of the preemption doctrine, it was upholding for the states the very considerable power to prohibit agreements which go the full limit allowed by the first proviso to section 8(a)(3) and impose the requirement of union membership. But an agreement which does not go so far as to require membership in its commonly accepted sense is not brought within the ambit of state power. Anyone who suggests that this conclusion leaves the states with a meaningless power, on the ground that fees and dues are the sole significant element of union membership, is simply lacking in knowledge of trade union traditions and the needs of a fully healthy and responsible labor organization.[16]

Our discussion thus disposes of the argument that section 14(b) confers on the states no substantial power unless it is construed to include the power to outlaw the agency shop. But even though a state could only prohibit what is already prohibited under section 8(a)(3), this would still leave it with the highly meaningful power of concurrent jurisdiction if, as we will later suggest is likely,[17] the states have the authority to enforce whatever legislation section 14(b) empowers them to enact.

D. The Limited Scope of "Membership" in §14(b)

Perhaps the most substantial argument which has been fashioned in an effort to avoid a natural reading of section 14(b) goes off in a much different direction from the one just discussed. Instead of saying that "membership" as used in the Act means essentially just "fees and dues obliga-

[16] See note 15 *supra*.

[17] See part II-E, *infra*, pp. 33-35.

tions," it says that Congress used "membership" in section 14(b) to stand for every kind of employment condition that might be imposed for the benefit of a union. This contention relies on such statements as Senator Taft's explanation that section 14(b) was added to ensure that the states were left the power to prohibit "all forms of compulsory unionism," 93 Daily Cong. Rec. 6602 (June 5, 1947), 2 Leg. Hist. 1543, and the explanation by the House managers that the section was intended to keep the Act from depriving the states of their power to prohibit a "closed shop, union shop, maintenance of membership, or other form of compulsory unionism." H. Conf. Rep. No. 510 on H.R. 3020, 80th Cong., 1st Sess., p. 60 (1947). The legislative history supplies several answers to this contention.

First of all, whenever the phrase "compulsory unionism" is used with any specificity in the reports or debates, it is always used in association with terms connoting a requirement of union membership in the usual and customary meaning of the word. This is true of the reference in the House report just quoted, which gave as examples of compulsory unionism three types of union security arrangements, all of which traditionally imposed the obligation of membership in the strict sense. It is also true of the statement by Senator Taft. Just prior to using the phrase "all forms of compulsory unionism," the Senator had described the effect of section 14(b) as making it clear that "nothing in the act is to be construed as authorizing compulsory union *membership* agreements" in states where such agreements were outlawed. 93 Daily Cong. Rec. 6602 (June 5, 1947), 2 Leg. Hist. 1543. (Emphasis added.)[18]

[18] Similarly, the original House report describes sec. 13 of the House bill, the predecessor of sec. 14(b) of the Act, as providing that state laws "that restrict the right of employers to require employees to become or remain *members* of labor organizations are valid." H. Rep. No. 245 on H. R. 3020, 80th Cong. 1st Sess.,

There is a more fundamental reason why general references to compulsory unionism should not be used to expand the term "membership" in section 14(b) beyond its normal scope. Indeed, we suggest that the essential key to understanding both the provisos to section 8(a)(3) and section 14(b) itself lies in appreciating one salient fact. In amending the National Labor Relations Act to combat what were regarded as the excesses of compulsory unionism, the majority of Congress was not concerned about the payment of nondiscriminatory fees to labor organizations; it was concerned about the "abuses of compulsory *membership*." S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess., p. 6 (1947). (Emphasis added.) Those abuses were seen as the requirement of "preexisting union membership as a condition of obtaining employment" and the use of "closed-shop devices as a method of depriving employees of their jobs" when they had been subjected to union discipline "for purely capricious reasons" *Ibid.* See also the specific incidents cited in 93 Daily Cong. Rec. 5087-88 (May 9, 1947), 2 Leg. Hist. 1419-20 (Sens. Ball, Taft); 93 Daily Cong. Rec. 4258 (April 28, 1947), 2 Leg. Hist. 1061-62 (Sen. Ellender); 93 Daily Cong. Rec. 5291 (May 13, 1947), 2 Leg. Hist. 1508

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p. 44 (1947). (Emphasis added.) On the limited scope of the terminology of sec. 14(b), see also 93 Daily Cong. Rec. A 3233 (June 21, 1947), 2 Leg. Hist 1627 (Sen. Taft: "State laws prohibiting union shops are to remain in effect"); 93 Daily Cong. Rec. 6614 (June 5, 1947), 2 Leg. Hist. 1561 (Sen. Morse: "this amendment proposes that we except from the national labor policy • • • national jurisdiction over these matters as they involve the closed shops and union shops"); 93 Daily Cong. Rec. 3563, 3617-18, 3620 (April 15-16, 1947), 1 Leg. Hist. 666, 743, 748 (Reps. Holifield, Case of South Dakota, and Hoffman). In short, as one writer has said regarding the use of the term "compulsory unionism" in the Taft-Hartley debates: "Particularly in the setting of the times, the phrase suggests enforced union membership in the full, formal sense." Graves, *supra* note 14, 40 Tex. L. Rev. at 547.

(Sen. Kem). Some members of Congress also expressed a certain "moral" concern about requiring any man to belong to an organization with which he did not wish to associate. See, *e.g.*, 93 Daily Cong. Rec. 5088-89 (May 9, 1947), 2 Leg. Hist. 1422-23 (Sens. Donnell, Hawkes); 93 Daily Cong. Rec. 3612, 3618-19 (April 16, 1947), 1 Leg. Hist. 733, 745 (Reps. Hoffman, Jonkman).

Legislative history thus establishes that the aim of the great majority in amending section 8(a)(3) was directed at compulsory membership as such, and not at the mere obligation to pay nondiscriminatory, nonexcessive fees.[19] Furthermore, when it comes to the legislative history of section 14(b) itself, we feel we can make the flat assertion that there is no intimation whatsoever that fee payments by themselves were any part of the compulsory unionism which the states were given the authority to regulate or prohibit. This is especially significant because Senator Taft had expressly referred on the floor of the Senate to the agency shop as it had developed in Canada,[20] see 93 Daily Cong. Rec. 5088 (May 9, 1947), 2 Leg. Hist. 1422, and the Senate and House committees were both aware that there could be arrangements whereby the obligation

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[19] Elsewhere in the Act Congress dealt specifically with the matter of payments to labor unions or their agents. See, *e.g.*, sec 8(b)(5) (charging employees excessive or discriminatory initiation fees) and sec. 302 of the Taft-Hartley Act, 61 Stat. 157 (1947), as amended by 73 Stat. 537, §505 (1959), 29 U.S.C. §186 (unauthorized employer payments to unions or employee representatives). This also indicates that if Congress had wished to allow the states to have authority under sec. 14(b) to deal with fee requirements as distinguished from membership requirements, it would have said so.

[20] See the arbitration decision by Justice Rand of the Supreme Court of Canada in *Ford Motor Company of Canada*, 1 Lab. Arb. Rep. 439 (1946).

to pay fees was separated from the obligation to join a union.[21]

Our insistence on a literal reading of "membership" in section 14(b) thus goes to the very heart of the congressional purpose. And that purpose was to curb the alleged evils of enforced membership by regulating the requirement of union membership as a matter of federal law, and by leaving the question of outright prohibition of the requirement of membership to the states. Fees divorced from membership were not regarded as the vice of compulsory unionism, and regulation of fees divorced from regulation of membership was not regarded as the cure. It follows that when Congress in section 14(b) left the power of further regulation of the requirement of membership in the hands of the states, it was not giving the power to regulate fees apart from membership.

Our analysis of the scope of section 14(b) is confirmed by several commentators. One of them writes:

> "A reading of the legislative history of this section of the Act indicates that Congress was influenced by arguments which struck at the morality of compelling membership in any organization as a condition of employment, but it should be noted that there is no suggestion in the debates or the records that the term *membership*, not qualified by a proviso as it was in §8(a)(3), was intended to have any meaning different from literal union membership."[22]

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[21] *See Hearings on S. 55 before the Senate Committee on Labor and Public Welfare*, 80th Cong., 1st Sess. pp. 66-67, 806 (1947); *Hearing on Bills to Amend the NLRA before the House Committee on Education and Labor*, 80th Cong., 1st Sess., pp. 1158-66 (1947).

[22] Note, "The Agency Shop and State Right-to-Work Laws," 35 Notre Dame Lawyer 547, 549 (1960). (Emphasis in the original.) See also Jones, *supra* note 15, 10 Lab. L.J. at 790 ("the agency shop is a lawful arrangement in any state if the intent of Congress when the Taft-Hartley amendment was passed in 1947 is con-

Nor is there any merit to the suggestion that "membership" in section 14(b) must be given an extended meaning because when Taft-Hartley was written, four or five of the states had enacted right-to-work laws which expressly included prohibitions on the payment of fees to labor organizations. These particular statutes were passed in early 1947, while the congressional hearings and debates were in progress. Not one had yet received a definitive interpretation in the state courts. Nowhere in the congressional reports or debates is there the slightest mention of the individual provisions of these state laws. Instead, as we have already said, whenever there is any specific mention of the types of agreements left subject to state control, the authorization is always phrased in terms of laws dealing with the "closed shop, union shop, or maintenance of membership," all of which require actual membership in the strict sense.

The subsequent application of the various right-to-work laws conclusively negates any sweeping congressional endorsement of their provisions. For example, as previously discussed,[23] the statutes of Arkansas and South Carolina have been applied to prohibit the exclusive hiring hall. While the Arkansas decision might be said to be a judicial construction of somewhat ambiguous statutory language, the South Carolina decision was based in part on an express provision forbidding any "agreement or combination • • • whereby any such union or organization acquires

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sidered"); Note, "The Agency Shop," 14 Fla. L. Rev. 281, 289-90 (1961) ("Any state that places greater restrictions on union security agreements than the prohibition of membership as a condition of employment has exceeded the authority granted to it under section 14(b)"). *Cf.* Graves, *supra* note 14, at 546 ("The chief reason assigned by the Senate report for the restrictions of section 8(a) (3) was union abuse of the closed shop privilege").

[23] See part II-A, *supra*, pp. 16-17.

an *employment monopoly* in any enterprise." So. Car. Code Ann. §40-46.1. (Supp. 1960). (Emphasis added.)[24] To impute to Congress the intent to allow state prohibition of fees payments could therefore logically mean imputing the intent to allow state prohibition of an "employment monopoly" like an exclusive hiring hall. We do not think that that will be this Court's ultimate disposition of the highly significant hiring hall issue, any more than it has been this Court's disposition of other state encroachments on federal labor policy in the name of right-to-work. *Cf. IBEW Local 429* v. *Farnsworth & Chambers Co.*, 353 U.S. 969; *DeVries* v. *Baumgartner's Electric Construction Co.*, 359 U.S. 498; *Laborers Local 438* v. *Curry*, No. 87, this Term, decided January 21, 1963.

In dealing with congressional purpose, we should not lose sight of the obvious. To embody the legislative intent regarding the allowable scope of state jurisdiction, the terminology chosen for section 14(b) was agreements "requiring membership"—and nothing else. As this Court has said: "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *United States* v. *American Trucking Associations*, 310 U.S. 534, 543.

E. Judicial Treatment of §14(b) As An Exception to Preemption

The Florida courts in *Schermerhorn*, like the Kansas Supreme Court in *Higgins* v. *Cardinal Manufacturing Co.*, 188 Kan. 11, 360 P.2d 456 (1961), *cert. den.* 368 U.S. 829,

[24] The South Carolina statute was not passed until 1954. The provision covering an "employment monopoly," however, is identical to a provision in the North Carolina statute, No. Car. Laws 1947, c. 328, No. Car. Gen. Stat. Ann. §95-79 (1958), in effect when Taft-Hartley was enacted.

misplaced their reliance in citing this Court's decision in *Algoma Plywood & Veneer Co.* v. *Wisconsin Employment Relations Board*, 336 U.S. 301, as broadly sustaining the power of the states under section 14(b) to regulate all kinds of union security agreements (R. 27-28). *Algoma* did nothing of the sort. *Algoma* upheld the power of a state labor agency to order reinstatement of an employee discharged under a maintenance of *membership* agreement which was executed in violation of a state law requiring a two-thirds employee vote approving such a clause. The situation therefore fell precisely within the terms of section 14(b)'s authorization for state laws dealing with the "execution or application" of contracts "requiring membership in a labor organization as a condition of employment." With the holding in *Algoma* we need not have the slightest quarrel.

Even so, *Algoma* has only a limited usefulness in treating the 14(b) issue because it was primarily concerned with an issue arising under the original Wagner Act. Not until after Taft-Hartley's comprehensive regulation of union as well as management activities did there begin the full development of the doctrine of federal preemption in the labor relations field. *Algoma* preceded *Garner* v. *Teamsters Local 776*, 346 U.S. 485, by over four and a half years, and *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, by over ten. And in the meantime came two highly significant per curiam reversals of state court assumptions of jurisdiction to enforce state labor relations or right-to-work laws as they affected activities involving union security arrangements. See *Plankinton Packing Co.* v. *Wisconsin Employment Relations Board*, 338 U.S. 953, *rvsg.* 255 Wis. 285, 38 N.W. 2d 688 (1949); *IBEW Local 429* v. *Farnsworth & Chambers Co.*, 353 U.S. 969, *rvsg.* 201 Tenn. 329, 299 S.W. 2d 8 (1957). See also the post-*Garmon* per curiam reversal in *DeVries* v. *Baumgartner's Electric*

Construction Co., 359 U.S. 498, *rvsg.* 77 So. Dak. 273, 91 N.W. 2d 663 (1958), and the decision of this Court in *Laborers Local 438* v. *Curry*, No. 87, this Term, decided January 21, 1963.

It has been suggested, on the basis of the last-cited per curiam decisions, that section 14(b) merely authorizes the states to declare agreements requiring membership unlawful, but that the states are preempted of the jurisdiction to enforce their laws, with the sole remedy being through an unfair labor practice proceeding before the NLRB. See, *e.g.*, *Building Construction Trades Council* v. *American Builders*, 139 Colo. 236, 337 P.2d 953 (1959). *Algoma* in effect would be regarded as overruled. This view of section 14(b) as simply empowering the states to cancel the protection afforded by the proviso to section 8(a)(3) is a possible one, and of course without more would call for reversal in *Schermerhorn*.

Such an interpretation of section 14(b) and of the reversals from *Plankinton* through *Curry*, however, may not be the most persuasive. The notion of a valid state law not enforceable by the state but only enforceable by a federal tribunal causes certain jurisprudential misgivings. Moreover, we do not know whether it can be shown that such a concept squares with the congressional design,[25] or that this

[25] The House bill, as reported and passed, contained in its counterpart to the present 8(a)(3) provisos authorizing the union shop an authorization for union membership requirements "if such provisions are not in conflict with the law of any State in which the agreement is to be carried out." H. R. 3020, 80th Cong., 1st Sess., "§8(d)(4)." The bill also contained a provision, however, that "such agreements shall, in addition to being subject to any applicable preventive provisions of this Act, be subject to the operation and effect of such State laws and constitutional provisions as well." *Id.*, "§ 13." Sec. 8(a)(3) of the Act is based on the Senate bill, which contained no language conditioning the validity of union security agreements on the absence of contrary state law. See H.R. 3020, as passed Senate, 80th Cong., 1st Sess., "§8(a)(3)."

Court has declared the demise of *Algoma* even to the extent of its precise holding. But we do wholeheartedly agree with the view that *Plankinton* and the several later reversals have sharply limited any broad reading of either *Algoma* or section 14(b)'s grant of authority to the states.

Plankinton and the other cases did not involve just the "execution or application" of an agreement requiring membership. In each instance there was other conduct, typically picketing to secure some arrangement but in *Plankinton* work stoppages and various forms of harassment to enforce one, which could not be characterized simply as the "execution or application" of a contract. This narrow reading of section 14(b), and this elimination of any expansive potentiality in *Algoma*, is wholly in accord with the preemption doctrine as refined in the decisions from *Garner* through *Garmon*. And "if the danger of state interference with national policy is to be averted," *Garmon*, 359 U.S. at 245, it is no more necessary to circumscribe the type of conduct over which the states can exercise jurisdiction than it is to circumscribe the type of agreement over which they can exercise jurisdiction. In the one case it is conduct which can be described strictly as the "execution or application" of an agreement; in the other it is an agreement which can be described strictly as one requiring "membership."

Assuming *Algoma* is still good law in holding that the states have the power to enforce whatever legislation, however limited, they are permitted by section 14(b) to enact, this dispels one final objection made by those who would read the section as conferring on the states the power to outlaw fee requirements. For even if the practical effect of section 8(a)(3) and its provisos were the prohibition of all true membership requirements, and even if the states could thus do no more than prohibit the same type of agreement already prohibited by section 8(a)(3), this would not

make the grant of authority in section 14(b) an empty gesture. The power of concurrent jurisdiction over agreements requiring membership, and the power to impose added penalties, including criminal penalties, for violations of state law, would remain powers of the most considerable magnitude. This would also be completely in accord with an express statement made by Senator Taft in explaining the conference agreement:

> "In other words, the whole spirit of the Wagner Act and its provisions would prohibit a *closed shop*, because it prohibits discrimination against people who are not *members* of labor unions. In order to preserve that right and to keep the Wagner Act itself from abolishing the *closed shop* everywhere, it was necessary to write in this proviso. But that did not in any way prohibit the *enforcement* of state laws which *already* prohibited *closed shops*.
>
> "That has been the law ever since that time. It was the law of the Senate bill; and in putting in this express provision [section 14(b)] from the House bill, we in no way change the bill as passed by the Senate of the United States." 93 Daily Cong. Rec. 6679 (June 6, 1947), 2 Leg. Hist. 1597. (Emphasis added.)

Section 14(b) of the Act was based on, and was intended to have the "same effect" as, section 13 of the House bill. See H. Conf. Rep. No. 510 on H.R. 3020, 80th Cong., 1st Sess., p. 60 (1947) As reported and passed, section 13 similarly provided only that agreements requiring union "membership" should be left subject to the "operation and effect" of state laws. H.R. 3020, 80th Cong., 1st Sess., "§ 13" (1947). In explaining this proposed section, the House committee was expressly cognizant that "by the Labor Act Congress preempts the field that the act covers" and that "the courts have not finally ruled upon the effect • • • of State laws dealing with compulsory unionism." H. Rep. No. 245 on H.R. 3020, 80th Cong., 1st Sess., p. 44

(1947). Yet no attempt was made to do more than see that state laws "that restrict the right of employers to require employees to become or remain *members* of labor organizations are valid." *Ibid.* (Emphasis added.)

Whether one looks to the floor debates, or the legislative purpose, or the committee reports, or the statutory language, or the subsequent trend of judicial decisions, only one conclusion is supportable: Congress in 1947 was leaving to the states the power to regulate the "execution or application" of agreements requiring union "membership" in the usual and customary meaning of the word—and that is all. Collective contracts requiring fees payments to a labor organization, though without doubt "arguably subject" to the jurisdiction of the NLRB, are not agreements requiring "membership" in a labor union. They are thus not subject to regulation or prohibition by any state.

III. An Agreement Like That In *Schermerhorn*, Requiring Employees To Pay A Service Fee Representing A Proration Of Collective Bargaining Costs, Is Not Subject To State Prohibition Under Section 14(b).

A. The Ruling at Issue in *SCHERMERHORN*

As we have demonstrated above, the legislative history and the purpose of section 14(b) call for a construction consistent with its plain meaning: union contracts requiring membership in a labor organization may be prohibited by a state, while those which do not require membership may not. Accordingly, even though they may constitute a form of "union security," contracts requiring of workers periodic payment obligations without requiring membership in the union, should not be construed within the state's prohibitory authority under section 14(b).

Nevertheless, we recognize that the "agency shop"

formula presented in the *General Motors* case remains arguably subject to state prohibition, on the theory that it does *in fact* require membership. It might be urged that under the General Motors-Meade[26] formula, since the periodic payments are but an equivalent substitute for union dues and are used for union benefits denied to nonmembers, the payment for unobtained benefits encourages membership and is tantamount to the compulsion of membership. The discussion presented in the previous section disposes, in our view, of this broader reading of section 14(b). But no occasion now arises for resolution of the question concerning the status of the agency shop in a "right-to-work" jurisdiction. Whatever might be the status under section 14(b) of a traditional agency shop contract requiring nonmembers to pay a union dues equivalent under another name, the *Schermerhorn* case does not involve the agency shop but the "service fee shop." The *Schermerhorn* contract calls for payment of a service fee *"for the purpose of aiding the Union in defraying costs in connection with its legal obligations and responsibilities as the exclusive bargaining agent of the employees"* (R. 9). (Emphasis added.) The contract requires a nonmember to pay only for the collective bargaining he actually obtains from the union. As we demonstrate herein, such a service fee obligation cannot be deemed "requiring membership in a labor organization" within the meaning of section 14(b).[27]

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[26] See *Meade Electric Co.* v. *Hagberg*, 129 Ind. App. 631, 159 N. E. 2d 408 (1959) (upholding under Indiana's right-to-work law a contract requiring employees either to join the union or to pay it an amount equivalent to dues and fees).

[27] It might be suggested, however, that if a service fee contract is not a form of union security subject to state prohibition under sec. 14(b), then it may also fail to survive under the provisos of sec. 8(a)(3) authorizing contracts requiring "membership." One answer, elaborated in part II-B, *supra*, is that the "requiring mem-

The ruling under review in *Schermerhorn* holds that Florida may prohibit the collection of any service fees from workers who elect not to join the union. The adjudication arises from a complaint by certain Food Fair employees asking the Florida court to declare invalid Section 2 of Article 19 of the contract between the union and the employer,[25] and to find that the union may not receive "*any* initial service fees or monthly service fees from plaintiffs * * * " (R. 6-7). (Emphasis added.) The Dade County

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bership" terminology of sec. 8(a)(3) and sec. 14(b) need not have and does not have the identical impact. Another answer is that a true service fee may well not need the saving provisos to sec. 8(a)(3), because it is not subject to the prohibitions of sec. 8(a)(3) *itself*. That section, which prohibits "discrimination" in the terms of employment "*to encourage*" membership, seems clearly inapplicable to a service fee requirement. A service fee cannot be viewed as constituting a discrimination "to encourage" membership in the union, but constitutes a legitimate proration of the costs of collective bargaining conducted by the union for all workers pursuant to the exclusive bargaining obligation of the federal Act. In any event, this question of federal law is not presented for the Court's present adjudication, which is limited to the issue regarding the ambit of Florida's prohibitory power under sec. 14(b).

[25] The relevant portion of Art. 19, Sec. 2 of the agreement (R. 3-4, 9) provides:

> "Employees shall have the right to voluntarily join or refrain from joining the Union. Employees who choose not to join the Union, however, and who are covered by the terms of this contract, shall be required to pay as a condition of employment, an initial service fee and monthly service fees to the Union for the purpose of aiding the Union in defraying costs in connection with its legal obligations and responsibilities as the exclusive bargaining agent of the employees in the appropriate bargaining unit. The aforesaid fees shall be payable on or before the first day of each month, and such sums shall in no case exceed the initiation fees and the membership dues paid by those who voluntarily choose to join the Union. Other than the payment of these service fees, those employees who do not choose to join the Union shall be under no further financial obligations or requirements of any kind to the Union."

Circuit Court dismissed the complaint *"for the reason that the Court finds that the agency shop clause, Section 2, Article 19 of the contract between the defendant Union and the defendant Food Fair is not violative of the Florida 'right-to-work law' * * * "* (R. 15). (Emphasis added.) This ruling was reversed by the Supreme Court of Florida, which held that Florida's right-to-work law prohibits a contractual requirement for the payment of any service fee. To the argument that the service fee does not require membership in the union but only a proration for collective bargaining services received by all workers, the Supreme Court of Florida replied that such a fee is a form of "association with a labor union," which the Constitution of Florida leaves a matter for "individual determination and preference" (R. 23):

> "The appellees contend that, except for the 'agency-shop' provision, the non-union employees of the appellant Food Fair would be 'free riders,' that is, they would reap the benefits of union representation without having to bear any of the cost thereof. This argument is grounded on the fact that the union is, by law, the bargaining agent for all employees—those who do not belong to the union as well as those who do. 29 U.S.C.A. §159. This argument may be answered by reference to the section of the [Florida] Constitution under consideration. Clearly, it is the intent of this section to leave as a matter for *individual determination and preference* the question of whether the worker will derive any benefit from association with a labor union. The choice is his to make."[29] (Emphasis in the original.)

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[29] The *Schermerhorn* contract does not itself set the amount of the service fee, although it does provide that in no case shall it exceed membership dues. A subsequent verbal understanding between the union and the employer was to the effect that the service fee would be equal to the union dues. However, the complaint does not attack the amount of the fee to be collected, but the power of the union to collect *any* service fee representing a proration of

B. No Congressional Purpose or Legislative History Supports State Authority to Prohibit A Prorated Service Fee For Collective Bargaining Costs.

Florida desires to treat a service fee for collective bargaining as a prohibited form of "association" with a labor union. But the ambit of Florida's prohibitory power is defined by section 14(b) of the national Act; and there is no apparent congressional purpose served nor legislative history to support so attenuated a construction of that section. In the subsequent discussion we review legislative history showing congressional desire to preclude "free riders," through the spreading of bargaining costs to all the employees. But for the present discussion, the significant fact is that nowhere in the entire legislative history was any suggestion made that states should be permitted to prohibit a prorated service fee for the collective bargaining which the union must conduct for all the workers.

Nor is any apparent congressional purpose served by importing into section 14(b) state authority to prohibit service fees. The extended legislative discussion of union security and compulsory unionism in connection with enactment of section 14(b) is wholly inapposite to the question of the collective bargaining service fee. No conscientious scruples of dissenters and nonjoiners are transgressed by the service fee shop, which neither compels nor even encourages union membership. Unlike agency shop formulas

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collective bargaining costs. The Florida courts' rulings are upon *that* question. The Florida lower court's dismissal of the complaint was based on the court's finding—"that the agency shop clause, Section 2, Article 19 of the contract between the defendant Union and defendant Food Fair is not violative of the Florida 'right to work law' "; and the Florida Supreme Court's reversal is limited to that ruling. Thus, all that is presently before this Court is the question whether Florida may prohibit the making of a contract calling for service fees "for the purpose of aiding the union in defraying" collective bargaining costs.

which may require payment by nonmembers for union benefits they do not receive, the service fee shop compels no one to pay for more than the collective bargaining benefits he does receive. Under these circumstances, it could be said that the service fee is not even a form of "union security," as commonly understood. At least it is clear that the service fee shop is wholly free of the "minority rights" objections honored by the Congress when in section 14(b) it delimited an area of state right-to-work authority.

Since no legislative history, no apparent congressional purpose, nor the text of section 14(b) itself support state authority to prohibit the service fee contract, the Florida Supreme Court's ruling in *Schermerhorn* must plainly fall for lack of any statutory support. But here there is even more—there is a clearly recognized congressional and public policy against state authority to prohibit the service fee.

C. State Authority to Prohibit the "Service Fee Shop" Is Contrary to Congressionally Recognized Public Policy.

Importing into section 14(b) state authority to prohibit the service fee shop would require the presumption of congressional idiosyncrasy. For Congress has long required through section 9(a) of the Act that the certified collective bargaining representative is the exclusive bargaining representative for all the employees in the bargaining unit, irrespective of their union membership or nonmembership. See, *e.g.*, *Wallace Corp.* v. *NLRB*, 323 U.S. 248, 255-56; *St. Louis Public Service Co.*, 77 NLRB 749 (1948); *Pittsburgh Plate Glass Co.*, 111 NLRB 1210 (1955). Only the clearest legislative language should lead to the conclusion that Congress authorized states to prohibit proration among all in the bargaining unit of the costs of the collec-

tive bargaining which Congress has required the union to undertake for the benefit of all."

Far from a congressional intent to bar fair taxation for compulsory representation, the chief sponsor of the 1947 Act expressly stated that the legislation was intended to *preclude* free riders, and to promote the spreading of the collective bargaining burden to all its beneficiaries. Senator Taft stated in the congressional debates that while there is no constitutional way to impose a direct tax "for union support, if the union is a recognized bargaining agent for all the men," Congress could yet validate contractual requirements for the payment of the costs of bargaining. See 93 Daily Cong. Rec. 5088 (May 9, 1947), 2 Leg. Hist. 1422. He emphasized that the legislation would preclude a situation—*the very situation created in Florida by the* Schermerhorn *ruling*—where those "not in the union will get a free ride" on the benefits obtained by the union's efforts:

> "I may say that the argument made for the union shop, and against abolishing the closed shop, is that if there is not a closed shop those not in the union will get a free ride, that the union does the work, gets the wages raised, then the man who does not pay dues rides along freely without any expense to himself. Under the Canadian rule, and under the rule of the committee, we pretty well take care of that argument. There is not much argument left." 93 Daily Cong. Rec. 5089 (May 9, 1947), 2 Leg. Hist. 1422.

Senator Taft clearly expressed the congressional intention to preclude free riders by validating *inter alia* contractual arrangements similar to those of the Canadian "Rand formula," which in the United States has taken the form of the agency shop and the service fee shop. It cannot be supposed that in the absence of any text or intimation to

that effect, the Act nevertheless left states free to revive the free rider situation Senator Taft had assured Congress was precluded by the Act.

Moreover, the federal policy reflected in the congressional mandate that the exclusive representative bargain for all, and in Senator Taft's assurance of congressional determination to preclude free riders, has been recognized by this Court. As long ago as *Steele* v. *Louisville & Nashville R. Co.*, 323 U.S. 192, the Court gave substance to the congressional requirement under the Railway Labor Act of representation for all in the craft or class, holding it a duty which must be exercised equally and without discrimination against nonmembers. See also *Syres* v. *Oil Workers Local 23*, 350 U. S. 892 (decided under the National Labor Relations Act). More recently in *Machinists* v. *Street*, 367 U.S. 740, the Court recognized the particular congressional concern over the costs of collective bargaining which the union must conduct for all in the craft. This Court ruled that the Railway Labor Act's union security proviso has a differing impact when the union seeks on the one hand to retain the worker's contribution for collective bargaining costs and on the other for union political activities. But in the service fee shop the contract calls only for collection of a service fee to defray the costs of collective bargaining; the obligation of the worker who chooses not to join the union is thus no more than his fair share of the collective bargaining costs of which he has been the beneficiary.[30]

In this respect such a service fee would be like the rea-

[30] An extended discussion of the equity of requiring nonunion employees to pay a "bargaining fee" to their collective bargaining representative is provided by Professor John V. Spielmans of Marquette in Spielmans, "Bargaining Fee versus Union Shop," 10 Ind. & Lab. Rel. Rev. 609 (1957).

sonably apportioned fee required of nonunion registrants using a union's exclusive hiring hall or referral system, which the Labor Board found neither discriminatory nor otherwise violative of the Act in *H. John Homan Co.*, 137 NLRB No. 118, 50 LRRM 1310, 1962 CCH NLRB ¶ 11,392 (June 29, 1962). A union operating an exclusive hiring hall is required by law to operate it nondiscriminatorily, see *Teamsters Local 357* v. *NLRB*, 365 U.S. 667, just as a union serving as exclusive bargaining representative is required to represent all employees nondiscriminatorily. The bargaining representative should be equally entitled to a fairly apportioned service fee to help defray its expenses. We also suggest that if a union found it could not pay its share of the costs of a joint employer-union arbitration system, as the duly selected collective bargaining agent it should be able to agree with the employer that all employees in the unit, union members and nonmembers alike, would be required to pay a reasonably apportioned amount toward the maintenance of the arbitration machinery.[21] At any rate, the legality of such an arbitration fund fee, or of the hiring hall fee in *Homan* or of the service fee in *Schermerhorn* or of any similar fee, should be decided by

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[21] A majority of the Labor Board in *Hughes Tool Co.*, 104 NLRB 318 (1953), was prepared to revoke the certification of a union which set up a fee schedule ($15 for a grievance, $400 for an arbitration) for providing particular services for nonmembers. In *Hughes*, however, the Board did not have before it the question of fairly *apportioned* fees; the fee schedule there had the obvious effect of making union membership preferable to nonmembership for employees needing particular services. And *Hughes* at least was handling the whole problem within the proper framework, *viz.*, federal law. So far as *Schermerhorn* is concerned, it matters not whether the service fee is lawful or unlawful under federal law; in either case, as long as the fee cannot be equated with membership, Florida is preempted of jurisdiction. *Cf. Garmon*, 359 U.S. 236; *DeVries* v. *Baumgartner's Electric Construction Co.*, 359 U.S. 498.

the NLRB as a matter of uniform national law and policy, and not by the states as a matter of their own individual and differing laws and policies.

Florida has sought to prohibit the service fee shop in the face of the clear national policy in favor of equal apportionment of the bargaining benefits and costs among all the workers. And if requiring the sharing of the costs of collective bargaining is "requiring membership" within the meaning of section 14(b), then that section has been stripped of any rational guidelines. On the limitless rationale of the Florida Supreme Court the hiring hall or the hiring hall fee, exclusive recognition or the collective contract itself, may just as easily be said to compel a worker's unwanted "association" with the union.[22] Section 14(b) on this theory becomes an unlimitable exception to federal preemption. Instead of a reservation of state authority to bar compulsory membership in the union, section 14(b) is then an invitation to state control of substantive matters which Congress relegated to the exclusive jurisdiction of the National Labor Relations Board.

This Court cannot open so wide a door in the congressionally created national jurisdiction unless Congress has manifested a readiness for shared jurisdiction with the states. Here the congressional purpose is aptly defined by the statutory language: states may prohibit agreements "requiring membership." A service fee contract is another matter—and Florida's desire to go so far afield cannot be sustained.

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[22] *Cf. Teamsters Local 357* v. *NLRB*, 365 U.S. 667, 675-76 ("It may be that the very existence of the hiring hall encourages union membership. • • • The truth is that the union is a service agency that probably encourages membership whenever it does its job well").

CONCLUSION

For the foregoing reasons the judgments below in *General Motors*, No. 404, and *Schermerhorn*, No. 368, should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 13

RETAIL CLERKS INTERNATIONAL ASSOCIATION, Local 1625, AFL-CIO, and WILLIAM TRAVIS, president of Retail Clerks International Association, Local 1625,
Petitioners

v.

ALBERTA SCHERMERHORN, LOIS DEVITA, JOYCE E. THURO and LARRY STARK,
Respondents

On Writ of Certiorari to the Supreme Court of the State of Florida

MOTION OF CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF AMICUS CURIAE

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IN THE

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OCTOBER TERM, 1962

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RETAIL CLERKS INTERNATIONAL ASSOCIATION, Local 1625, AFL-CIO, and WILLIAM TRAVIS, president of Retail Clerks International Association, Local 1625,
Petitioners

v.

ALBERTA SCHERMERHORN, LOIS DEVITA, JOYCE E. THURO and LARRY STARK,
Respondents

On Writ of Certiorari to the Supreme Court of the State of Florida

MOTION OF CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The Chamber of Commerce of the United States respectfully moves this Court for leave to file the accompanying brief in this case as *amicus curiae*.

Attorneys for the petitioners and the respondents have declined to consent to the filing of a brief by the Chamber of Commerce as *amicus curiae*.

The legal issue before the Court, however, is of tremendous importance to the business community of the

United States. The Chamber of Commerce is the largest national representative of American employers, with a membership of more than 30,000 business firms, and 3,714 trade and business associations. The National Chamber thus serves as the voice of more than 3,000,000 employers.

The Chamber has an interest in this case because most of its members are engaged in businesses whose activities affect interstate commerce, and are subject to federal laws that affect their employer-employee or employer-union relationship.

This brief is filed because the issue involved here is of widespread significance and of utmost importance to the members of the Chamber of Commerce of the United States. The issue far transcends the activities of a Miami union local of grocery clerks and the employees who do not wish to be forced to support an unwanted organization, because their employer has agreed with this third-party organization that his employees must pay financial tribute to it or give up their employment.

On behalf of the interests of the business community which it represents, the Chamber of Commerce of the United States respectfully moves that the annexed brief *amicus curiae* supporting the judgment herein of the Supreme Court of Florida be received and considered by this Honorable Court.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 368

RETAIL CLERKS INTERNATIONAL ASSOCIATION, Local 1625, AFL-CIO, and WILLIAM TRAVIS, president of Retail Clerks International Association, Local 1625,
Petitioners

v.

ALBERTA SCHERMERHORN, LOIS DEVITA, JOYCE E. THURO and LARRY STARK,
Respondents

On Writ of Certiorari to the Supreme Court of the State of Florida

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I. INTRODUCTION

This brief *amicus curiae* is submitted by the Chamber of Commerce of the United States of America as provided in Rule 42(3) of the Rules of the Supreme Court following a motion for leave to submit such a brief.

II. INTEREST OF THE CHAMBER OF COMMERCE OF THE UNITED STATES

The Chamber of Commerce of the United States of America is a federation, consisting of a membership of

more than 30,000 business firms and 3,714 state and community chambers of commerce and trade and professional associations. There is an underlying membership of approximately 3,000,000 business organizations.

The National Chamber sets forth the views and opinions of the business community in many fields, including labor-management relations. Although the National Chamber is not directly interested in the behalf of any party to this action, the questions involved herein are of general interest and of utmost concern to the entire business community of the United States.

In particular it is of interest to businesses in those states which regulate or prohibit compulsory unionism and to businesses in those states that are contemplating enactment of legislation in this area. Many businesses for which *amicus* speaks are engaged in interstate commerce or in activities that affect interstate commerce; therefore, they are subject to the various federal labor statutes.

Amicus respectfully requests that its brief be considered by this Court.

III. STATEMENT OF FACTS

This cause stems from the objection of four persons, employed in a Miami, Florida, grocery store operated by Food Fair Stores, Inc., to their employer deducting moneys from their wages to support Local 1625 of the Retail Clerks International Association, a labor union these four employees did not want nor seek to have represent them in collective bargaining or in other matters with their employer. The employer had agreed with the labor union to require all of its employees to financially support the union, regardless of the desires and wishes of the employees.

The four employees relied upon the protection of the constitution of the State of Florida which outlaws union compulsion.[1] The Supreme Court of Florida upheld the contention of the employees, respondents herein. This Court then granted the union's petition for certiorari.

Amicus curiae intends to limit its argument to the contention of the petitioner that the National Labor-Management Relations Act, 61 Stat. 151, 29 U.S.C. Sec. 164 (b)[2], does not allow the individual states to enact statutes or constitutional provisions to prohibit what commonly are known as "agency shop" agreements in labor-management contracts.

Petitioner contends that Section 14(b) limits the states to make illegal labor-management contract clauses requiring membership in a labor organization, but that such limitations may not include the compulsory support (agency shop) of a labor organization.

Amicus takes the position that Section 14(b) reaffirms the authority of states to outlaw all forms of union compulsion.

IV. ARGUMENT

A. The Agency Shop

The term "agency shop" is another of the many sobriquets designed by union officials to avoid the unpopular and dictatorial, but accurate, term "compulsory unionism". Like so many of its trite predecessors—"closed shop", "union shop", "union security", "maintenance of membership"—all are devices to compel an employee to

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[1] Amendment to Section 12 Florida Constitution, Nov. 7, 1944: "The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization . . ."

[2] Hereafter called Sec. 14(b).

support a labor organization for which he has no interest, need or desire.

Under an agency shop agreement, an employee is not required to formally become a member of a union in order to hold his job, but he must contribute to the financial support of the union in amounts generally equal to union initiation fees, union dues, and union special assessments required of union members. He is not permitted to participate in union meetings, to vote on matters affecting his employment, or to qualify for union emoluments that may be given to the "faithful".

Did Congress, in the National Labor-Management Relations Act, intend to preclude the states from proscribing agency shop agreements?

The legislative history of Sections 8(3) of the Wagner Act and 8(a)(3) and 14(b) of the Taft-Hartley Act, together with applicable decisions of this Court, dictate a negative answer.

Between the enactment of the Wagner Act in 1935 and the Taft-Hartley Act in 1947, several states had adopted statutes or constitutional amendments against compulsory unionism.

It is clear from their language that all forms of union compulsion—via membership or financial support outside formal membership—was declared to be against the public policy of the State. Congress, of course, was aware that these states clearly sought to protect an employee's right to join a union or to refrain from joining or supporting a union.

The language of these States clearly precludes an agency shop form of compulsion:

> *Arkansas*, ". . . . Nor shall any person against his will be compelled to pay dues to any labor organization as a prerequisite to or condition of employ-

ment." (Constitutional Amendment 34, Nov. 7, 1944).

Virginia, "No employer shall require any person, as a condition of employment, to pay any dues, fees or other charges of any kind to any labor union or labor organization." (Code of Virginia, Sec. 40.72, Jan. 12, 1947).

Tennessee, "It shall be unlawful for any person, firm, corporation or association of any kind to exclude from employment any person by reason of such person's payment of or failure to pay dues, fees, assessments, or other charges to any labor union or employee organization of any kind." (Tennessee Code, Sec. 50.210,, Feb. 21, 1947).

North Carolina, "No employer shall require any person, as a condition of employment or pay any dues, fees or other charges of any kind to any labor union or labor organization." (Genl. Stats. of North Carolina, Sec. 95-82, Mar. 18, 1947).

Georgia, "No individual shall be required as a condition of employment, to pay any fee, assessment, or other sum of money whatsoever to a labor organization." (Georgia Code, Sec. 54-902, Mar. 27, 1947).

Iowa, "It shall be unlawful for any person, firm, association, labor organization or corporation . . . either directly or indirectly . . . as a prerequisite to or a condition of employment to require any person to pay dues, charge fees, contributions, fines or assessments to any labor union. . . ." (Iowa Code, Sec. 736A.4, April 28, 1947).

A review of the legislative history of the Taft-Hartley Act indicates, as *amicus* will show, that Congress had no desire whatsoever to interfere or preempt these statutes or constitutional amendments. It is equally clear that these laws prohibited contractual agreements which were later to develop under the title "agency shop".

This was the backdrop before which the Taft-Hartley bills were debated and which later became the law.

B. Legislative History

The legislative history of the 1947 National Labor-Management Relations Act contains numerous references that clearly indicate the intent of the 80th Congress not to preempt state law in the area of union compulsion.

(1) *Congressional Reports:*

House Conference Report No. 510 at page 60 specifically illustrates this intent by both houses of Congress:

> "Under the House bill there was included a new section 13 of the National Labor Relations Act to assure that *nothing in the act was to be construed as authorizing any closed shop, union shop, maintenance of membership, or other form of compulsory unionism agreement in any State where the execution of such agreement would be contrary to State law. Many States have enacted laws or adopted constiutional provisions to make all forms of compulsory unionism in those States illegal. It was never the intention of the National Labor Relations Act, as is disclosed by the legislative history of that act, to preempt the field in this regard so as to deprive the States of their powers to prevent compulsory unionism."*[3] (Italics supplied).

House Report No. 245 (page 40), when explaining Section 10 of H.R. 3020, referred to state control over all types of "union security":

> "As under the present act, the power of the Board [NLRB] under the amended act in the matter of unfair labor practices is exclusive. This rule has necessitated a special provision. (Sec. 13 hereafter discussed) to give to the States a concurrent jurisdiction in respect of closed-shop *and other union-security arrangements."*[4] (Italics supplied).

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[3] Vol. 1, Legislative History Labor-Management Relations Act, Page 564.

[4] Vol. 1, Legislative History Labor-Management Relations Act, page 331.

Note the phrase "and other union security arrangements". This leaves no doubt that the legislative intent was to permit the states to ban all deals for union security or union compulsion if the state so wished.

The opponents to the legislation, in their minority views expressed in the same House Report No. 245, agree that the bill would leave authority to cope with union compulsion problems to the individual states. In their discussion of the closed shop and "union security" beginning on page 79 of the report, the minority say on page 81:

> "Contrary to widespread belief, this provision does not legalize or extend the use of union security provisions. In fact, it limited their use by establishing the two requirements set forth above, which did not exist prior to the passage of the act, *the national statute has left the State laws where it found them.*"[5] (Italics supplied).

The original Senate labor bill, S. 1126, contained no specific section concerning the reservation of authority to the states.

Elsewhere in House Report No. 245 on H.R. 3020, it is emphatic that state authority in the area of union compulsion is maintained (page 34):

> ". . . and by section 13 the United States expressly declares the subject of compulsory unionism one that the States may regulate concurrently with the United States, not withstanding that the agreements affect commerce, *and notwithstanding that the State laws limit compulsory unionism more drastically than does Federal law.*"[6] (Italics supplied).

At that time at least nine states already had statutes forbidding compulsory unionism.

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[5] Vol. 1, Legislative History Labor-Management Relations Act, page 372.

[6] Vol. 1, Legislative History Labor-Management Relations Act, page 325.

Again in House Report No. 245 (page 44) there is an explanation of Section 13, the section which later became the present Section 14(b):

> "Section 13.—Since by the Labor Act Congress preempts the field that the act covers insofar as commerce within the meaning of the act is concerned, and since when this report is written the courts have not finally ruled upon the effect upon employees of employers engaged in commerce of State laws dealing with compulsory unionism, the committee has provided expressly in section 13 *that laws and constitutional provisions of any State that restrict the right of employers to require employees to become or remain members of labor organizations are valid, not withstanding any provision of the National Labor Relations Act.* In reporting the bill that became the National Labor Relations Act, the Senate committee to which the bill had been referred declared that the act would not invalidate any such State law or constitutional provision. The new section 13 is consistent with this view."[1] (Italics supplied).

Subsequently, the Senate amended H.R. 3020 by substituting the language of its bill, S. 1126, for the language in H.R. 3020 that had passed the House. When the House disagreed, the two versions went to a joint conference, and the conferees adopted the wording as it now appears in Section 14(b) of the Taft-Hartley Act:

> "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

(2) ***Congressional Debates:***

When the floor debates are examined on 14(b) in both the House and Senate, the same conclusion to protect

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[1] Vol. 1, Legislative History Labor-Management Relations Act, page 335.

the right of states to outlaw all forms of compulsory unionism, if they so wish, is brought out repeatedly.

On April 16, 1947, Rep. Hoffman of Michigan in a speech on the House floor contended that there was no real difference—except "a play on words" between a closed shop and a union shop. To Rep. Hoffman, both spelled COMPULSORY UNIONISM. He sought to offer an amendment that would prevent all forms of compulsory unionism as a national policy. He declared:

> "If we are going to write a labor bill for the benefit of the man who works, then we should amend this section and subsequent sections and provide that any and every man should have the opportunity to work at, when, and where he can find a job."[8]

Rep. Owens of Illinois opposed the Hoffman amendment, and Rep. Halleck of Indiana raised a question about state authority to deal with forced unionism. He asked:

> "Does not the bill recommended by the committee also contain a provision granting to the States authority *to deal with this whole problem* if they so desire?" (Italics supplied).

Rep. Owens replied:

> "Absolutely. *The States can deal with the problem. It does not affect in any way the many States,* that have already acted upon it and others that probably will act upon it. Therefore, I say the amendment offered by the gentleman from Michigan [Hoffman] should be voted down." (Italics supplied.)

The same evidence is found in the Senate debate concerning Section 14(b) and compulsory unionism.

On June 5, 1947, Senator Taft took the floor to explain the principal differences between the Senate's labor bill and the joint conference agreement. He said:

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[8] Vol. 1, Legislative History Labor-Management Relations Act, page 733; Cong. Rec. (daily) (April 16, 1947) page 3612.

"A new subsection has been added to section 14 to make it perfectly clear that nothing in the act is to be construed as authorizing compulsory union membership agreements, in States where the execution or enforcement of such agreements would be contrary to State law. *Many States have enacted laws or adopted constitutional provisions to make all forms of compulsory unionism in such states illegal.* As stated in the report accompanying the Senate committee bill, *it was not the intent to deprive the States of such power.* The conferees, therefore, had no objection to the adoption of the House provision to that effect."[9] (Italics supplied).

Senator Taft verbally underlined this explanation in reply to a question by Senator Ball of Minnesota:

"The Senate Committee report stated on its face that *state laws would still remain in effect.* All we have done is to write in expressly what our committee report said."[10] (Italics supplied).

Later the same afternoon, Senator Taft reiterated this. He declared:

"Many states have enacted laws or adopted constitutional provisions to make all forms of compulsory unionism in such States illegal. As stated in the report accompanying the Senate committee bill, it was not the intent to deprive the States of such power."[11]

Opponents to the proposed new law also agreed with the majority. Senator Morse of Oregon, attacked the report in a Senate speech the same day, June 5, 1947. Commenting on the question of the union shop and state's rights, he exclaimed:

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[9] Vol. II, Legislative History Labor-Management Relations Act, page 1543; Cong. Rec. (daily) (June 5, 1947) page 6602.

[10] Vol. II, Legislative History Labor-Management Relations Act, page 1546; Cong. Rec. (daily) (June 5, 1947) page 6604.

[11] Vol. II, Legislative History Labor-Management Relations Act, page 1561; Cong. Rec. (daily) (June 5, 1947) page 6613.

> "Thus, we lay down in the bill a very full and complete national policy as to closed and union shop agreements. At the same time, the bill provides in Section 13(b), [*sic*] however, that *the national policy may be entirely disregarded and superseded by the states if they desire to impose a more restrictive policy* on the same subject matter."[12] (Italics supplied).

Senator Murray of Montana, also an opponent of the Taft-Hartley bill, submitted his analysis of Section 14(b):

> "Section 14 in subsection (b) also provides that *nothing in the bill shall be construed as authorizing the execution of any union security agreement in a state in which such agreements are prohibited . . . . Section 14(b), however, expressly provides that in the cases where the state law covering union-security agreements is more rigorous than the policy expressed in the bill such state law shall be unaffected.*"[13] (Italics supplied).

Note particularly that Senator Murray talked of "union security agreements"—not merely union shop or closed shop or maintenance of membership. To today's union officials, the demanded "agency shop" is a form of "union security".

Senator Magnuson of Washington took the same view. On June 6, 1947, he placed in the *Congressional Record* (page 6694 Daily Record) what he considered 36 concessions the Senate made to the House. Among them, he said the new Section 14(b) had the same effect as the original Section 13 of the House bill.

Within the next two weeks the Taft-Hartley bill passed both houses of Congress only to be vetoed by President Truman June 20, 1947. In this message President Tru-

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[12] Vol. II, Legislative History Labor-Management Relations Act, page 1561; Cong. Rec. (daily) (June 5, 1947) page 6613.

[13] Vol. II, Legislative History Labor-Management Relations Act, page 1586; Cong. Rec. (daily) (June 6, 1947) page 6665.

man said he objected to state authority over compulsory unionism. He wrote:

> "The bill's stated policy of preserving some degree of union security would be abdicated in all states where more restrictive policies exist."[14]

The Congress overrode the President's veto, and the Taft-Hartley bill became law.

C. The Wagner Act

Although there was a new national policy on labor-management relations, there was no change from the Wagner Act policy in respect to the power of the states to outlaw compulsory unionism. When the Wagner Act was adopted 12 years earlier in 1935, this area of the law was left to the states.

Senator Wagner himself clearly explained he had no intention of interfering with states rights in this field.

When on February 21, 1935, he introduced S.1958, the bill that eventually became the National Labor Relations Act, he offered an accompanying statement which said in part:

> "Equally erroneous is the belief that the bill creates a closed shop for all industry. It does not force any employer to make a closed-shop agreement. It does not even state that Congress favors the policy of the closed shop. *It merely provides that employers and employees may voluntarily make closed shop agreements in any State where they are now legal. Far from suggesting a change, it merely preserves the status quo.*"[15] (Italics supplied).

The Senate Labor Committee, in comparing Senator Wagner's S.1958 with his previously introduced 1934 bill (S.2926), confirmed this:

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[14] Vol. I, Legislative History Labor-Management Relations Act, page 921; Cong. Rec. (daily) (June 20, 1947) page 7503.

[15] Legislative History of the Wagner Act, page 1312; Cong. Rec. (daily) (Feb. 21, 1935) page 2368.

"The proviso in the two drafts are similar in purpose. *They are intended merely to preserve the status quo as to the legality of closed-shop agreements under the common law in the different States,* and to make clear that neither Sec. 7(a) nor any other statute of the United States precludes such agreements . . . .

"The proviso does not make closed shop agreements legal; it merely says that nothing herein should illegalize them. *The operation of State common law on the subject is left unaffected. . .*" (Italics supplied.).

Senator Wagner's purpose was to preserve the right of states to legalize forced unionism.

"Unless this change is made as provided in S.1958, most strikes for a closed shop or even for a preferential shop would by this Act in effect be declared to be for an illegal purpose, and hence would be enjoinable in many States." (Committee print, Senate Labor Committee, March 11, 1935, 74th Congress.)

D. Judicial Interpretation

This court as long as 14 years ago, recognized and applied the legislative histories of the Wagner and Taft-Hartley Acts to permit the state full leeway in the regulation of various "union security" devices.

The leading and clearly controlling decision is this Court's opinion in *Algoma Plywood & Veneer Co.* v. *Wisconsin Employment Relations Board,* (1949) 336 U.S. 301; 98 L. ed. 691; 69 S. Ct. 548; 23 LRRM 2402. The Wisconsin Employment Relations Board had ordered an employer to cease giving effect to a maintenance of membership clause in a collective bargaining contract on the ground that such clause was in violation of a Wisconsin statute. Both the plywood company and the union concerned contended the Wisconsin statute was repugnant to Section 8(3) of the Wagner Act and Sections 8(a)(3) and 14(b) of the Taft-Hartley Act.

While the case involved the power of a state to outlaw the maintenance of membership form of compulsory unionism, it actually dealt with a discharge for non-payment of union dues. In effect this is the very question raised in the *Schermerhorn* case.

This Court ruled that the history of Sections 8(a)(3) and 14(b) clearly indicated a Congressional intent to leave the states a free hand in the area of compulsory unionism.

Referring to Section 8(3) of the Wagner Act, the predecessor to 8(a)(3), this Court said (at page 307):

> "The short answer is that Section 8(3) merely disclaims a national policy hostile to the closed shop *or other forms of union-security agreement.* This is the obvious inference to be drawn from the choice of the words 'nothing in this Act . . . or in any other statute of the United States,' and it is confirmed by the legislative history." (Italics supplied).

Then taking up the Taft-Hartley Sections 8(a)(3) and 14(b), this Court declared on pages 313-14:

> "Other provisions of the Taft-Hartley Act make it even clearer than the National Labor Relations Act that States are left free to pursue their own more restrictive policies in the matter of union-security agreements. Because Sec. 8(3) of the new Act forbids the closed shop and strictly regulates the conditions under which a union-shop agreement may be entered, Sec. 14(b) was included to forestall the inference that federal policy was to be exclusive. . . .
>
> "It is argued, however, that the effect of this section is to displace State law which 'regulates' but does not wholly 'prohibit' agreements requiring membership in a labor organization as a condition of employment. But if there could be any doubt that the language of the section means that the Act shall not be construed to authorize any 'application' of a union-security contract, such as discharging an employee, which under the circumstances 'is prohibit-

ed' by the State, the legislative history of the section would dispel it."

This Court at least twice subsequent to its *Algoma* decision has cited it with approval. In *Weber* v. *Anheuser-Busch, Inc.*, (1955) 348 U.S. 468; 99 L. ed. 546; 75 S. Ct. 480; 35 LRRM 2637, the issue was federal preemption under the Taft-Hartley Act. This Court at page 477 explained its *Algoma* opinion saying it allowed a State to forbid the enforcement of a maintenance of membership contract, "Since nothing in the Wagner or Taft-Hartley Acts sanctioned or forbade these clauses, they were left to regulation by the State".

As recently as 1959, this Court again pointed out the special position occupied by the states under Section 14(b) in a footnote in *Teamsters Union* v. *Oliver*, 358 U.S. 283, 296; 3 L. ed. 2d 312; 79 S. Ct. 297; 43 LRRM 2374:

> "10. In *Algoma*, state law was allowed to operate to restrict a provision of a collective bargaining contract only after it was found after an exhaustive examination of the legislative history of the Wagner Act that Congress intended to leave the special subject of the legality of maintenance of membership clauses up to the States through Section 8(3) of that Act, 49 Stat. 452."

The petitioner union in the *Schermerhorn* case relies on the "plain meaning" rule of statutory construction to have "membership" construed literally. While there is nothing wrong with that rule of construction in an appropriate case, it has no place here. Sections 8(a)(3) and 14(b) were definitely construed to the contrary of the union's position by this Court 14 years ago. A settled and sound construction cannot be overcome by later application of the "plain meaning" rule of construction.

E. Landrum-Griffin Act Legislative History

Congress has had ample time and opportunity during the 14 years since the *Algoma* decision by this Court to "correct" it, if it felt that the Court was in error.

Not only has Congress failed to take such action; thereby, confirming the soundness of *Algoma*, but it specifically negated an attempt to permit the possibility of a type of "agency shop" clause when it enacted the 1959 Labor-Management Reporting and Disclosure Act (Landrum-Griffin), 73 Stat. 519, 29 USC 401.

The legislative history of the Landrum-Griffin Act shows again that Congress intended to leave compulsory unionism to the States. This is clearly brought out in a review of pertinent legislative history in the U. S. District Court of Nevada's opinion in *Amalgamated Association of Street Electric Railway Employees* v. *Las Vegas-Tonopah-Reno Stage Line, Inc.*, (1962) 202 F. Supp. 726; 49 LRRM 2732.

Like the present *Schermerhorn* case, the Nevada action was brought by a union against an employer for refusing to enforce an "agency shop" clause in the labor-management contract it signed with the union. The employer contended the "agency shop" clause was unlawful.

The court upheld the defendant's view that the Nevada right to work law prohibited an agency shop. In marshalling facts to support its decision, the court, among other things, searched the legislative history of the Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin) to find that the Congress specifically deleted language from a proposed bill that could have been interpreted as sanctioning agency shop clauses.

The court notes that, "On January 20, 1959, the so-called Kennedy-Ervin bill (S.505) was introduced in the Senate . . . . Section 112 of that bill made certain amendments to Section 302 of the Taft-Hartley Act.

Section 302(c)(4) was proposed to be amended so that it would exempt from the general prohibitions of Section 302 'money deducted from wages of employees in payment of *membership dues in or periodic payments* to a labor organization'" . . . (Italics supplied by the court).

The opinion points out that Senator Goldwater, ranking minority member of the Senate Labor and Public Welfare Committee, analyzed what he termed "major deficiencies in the labor reform bill". He said:

> "The bill permits the checkoff of fees paid in lieu of dues to a labor union. This tacitly recognizes that the so-called agency shop is lawful."

But when the Kennedy-Ervin bill and the House's Landrum-Griffin bill were sent to a joint Senate-House conference, the emerged proposal found the agency shop device eliminated. Senator Morse explicitly pointed this out. He explained:

> "The conference committee bill omits, however, the provision which is contained in the Kennedy-Ervin bill authorizing the checkoff of periodic payments in lieu of membership dues under so-called agency shop." 105 Cong. Rec. 18389 (daily ed. September 3, 1959); Vol. 2, Legislative History, page 1418.

The U.S. District Court for Nevada then clearly sums up its understanding of this portion of legislative history and the agency shop:

> "We are, therefore, of the opinion that the legislative history of the Labor-Management Reporting and Disclosure Act of 1959 makes clear that Congress wanted to do nothing which would lend any weight to any argument that it was willing to sanction the agency shop in states which had enacted right to work legislation. Furthermore, the actions of Congress in 1959, accord at least inferential support to the contention that Congress, in 1947, was of a mind to allow the States to ban what, under the federal statute, is realistically the equivalent of the union shop —the agency shop."

V. SUMMARY AND CONCLUSION

Amicus has attempted to bring before the Court its interpretations of the various cases, statutes, and legislative history that are involved in this case.

We maintain that the Congress has not preempted the right of states to place restrictions upon union compulsion or union security. Congress has made clear its intent to reserve this area to the States in its three attempts to enact legislation affecting the national labor policy. The legislative history of the Wagner Act, the Taft-Hartley Act, and the Landrum-Griffin Act confirms this intent.

This Court also has so found, especially in its opinion in the *Algoma Plywood* case, discussed at length by *amicus*. The Supreme Court's construction in that case still controls.

For the reasons stated, *amicus* asks the Court to affirm the decision of the Supreme Court of Florida that the National Labor-Management Relations Act does not preempt the individual states from outlawing so-called agency shop clauses in collective bargaining contracts.

Respectfully submitted,

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Attorneys for the Chamber of Chamber of Commerce of the United States of America.

PROOF OF SERVICE

I, Harry J. Lambeth, one of the attorneys for the movants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the day of February, 1963, I served copies of the foregoing BRIEF AMICUS CURIAE on the several parties to the principal case as follows:

(1) On the petitioners, Retail Clerks International Association, Local 1625, AFL-CIO, and William Travis, president of Local 1625, by mailing a copy in a duly addressed envelope, with postage prepaid, to their attorney of record as follows: S. G. Lippman, Esquire, general counsel, De Sales Building, Connecticut and De Sales Street, Washington 6, D. C.

(2) On the respondents, Alberta Schermerhorn, Lois Devita, Joyce E. Thuro, and Larry Stark by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to their attorney of record as follows: Bernard B. Weksler, Esquire, 509 Industrial National Bank Building, Miami, 32, Florida.

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Harry J. Lambeth

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In The

Supreme Court of the United States

October Term, 1963

No. 13

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL 1625, AFL-CIO, AND WILLIAM TRAVIS, PRESIDENT OF RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL 1625, AFL-CIO,

Petitioners,

v.

ALBERTA SCHERMERHORN, LOIS DEVITA, JOYCE E. THURO AND LARRY STARK,

Respondents

AMICUS CURIAE BRIEF ON BEHALF OF THE COMMONWEALTH OF VIRGINIA

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In The

Supreme Court of the United States

October Term, 1962

No. 368

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL 1625, AFL-CIO, AND WILLIAM TRAVIS, PRESIDENT OF RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL 1625, AFL-CIO,

Petitioners,

v.

ALBERTA SCHERMERHORN, LOIS DEVITA, JOYCE E. THURO AND LARRY STARK,

Respondents

AMICUS CURIAE BRIEF ON BEHALF OF THE COMMONWEALTH OF VIRGINIA

PRELIMINARY STATEMENT

Robert Y. Button, Attorney General of Virginia, files this brief pursuant to Rule 42 of this Court and respectfully requests that it be received and considered.

OPINION BELOW

This case is before this Court upon a writ of certiorari to the judgment of the Supreme Court of Florida issued on April 25, 1962. The opinion of that court is reported in 141 So. 2d 269.

STATEMENT OF THE CASE

The case arose in the State of Florida which has as a part of the Declaration of Rights in its Constitution, Section 12, reading as follows:

> "The right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union, or labor organization; provided, that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer."

The Appellant union entered into a collective bargaining contract with Food Fair Stores, Inc., containing, among the provisions, a clause as follows:

> "Employees shall have the right to voluntarily join or refrain from joining the Union. Employees who choose not to join the Union, however, and who are covered by the terms of this contract shall be required to pay as a condition of employment, an initial service fee and monthly service fees to the Union for the purpose of aiding the Union in defraying costs in connection with its legal obligations and responsibilities as the exclusive bargaining agent of the employees in the appropriate bargaining unit."

The respondents are individual employees of Food Fair who "are not and do not want to be members of the Union," "who do not want to participate in any Agency Shop relationship," and who "do not want to pay to the defendant Union any dues or service fees or initiation fees" (R. 5).

The individual employees sought an injunction against the enforcement of the Agency Shop clause.

The Supreme Court of Florida determined the clause to

be "palpably and totally inconsistent with the freedom of choice contemplated" by the Florida Constitution.

Pending review by this Court the Florida Supreme Court has stayed its mandate.

THE INTEREST OF THE COMMONWEALTH OF VIRGINIA WHICH IS SOUGHT TO BE PROTECTED HERE

The Commonwealth of Virginia since 1947 has protected the rights of its individual citizens with respect to their joining or refusing to join a labor union. This protection is afforded by Article 3, Chapter 4, Title 40, Code of Virginia, 1950, as amended, commonly known as the "Virginia Right to Work Law." (See Section 40-68 thru 40-74, Code of Virginia, 1950.) The Virginia Right to Work Law is set forth in full in the appendix hereto. The Virginia Act was approved on January 21, 1947, six months prior to the enactment of the "Taft-Hartley Law" by which Congress on June 23, 1947, amended the National Labor Relations Act.

The Virginia law provides in part that:

> "It is hereby declared to be the public policy of Virginia that the right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization." (See Section 40-68, Code of Virginia.)

In addition, the Virginia Law unquestionably and specifically prohibits the so-called "Agency Shop" arrangement.

> "No employer shall require any person, as a condition of employment or continuation of employment, to pay any dues, fees or other charges of any kind to any labor union or labor organization." (See Section 40-72, Code of Virginia)

The Virginia statute was before this Court in *Local Union No. 10* v. *Graham*, 385 U. S. 192, 73 S. Ct. 585, 97 L. Ed. 946, in which case, this Court affirmed the judgment of the Supreme Court of Appeals which had in turn affirmed the decree of the Virginia trial court enjoining peaceful picketing for "purposes and objectives in conflict with the provisions of the Right to Work laws of the State of Virginia" (345 U. S. 195).

The Virginia statute was also upheld by the State Supreme Court in *Finney* v. *Hankins*, 189 Va. 878, where Mr. Justice Buchanan speaking for a unanimous court said:

> "Very clearly there was reasonable basis for the legislative view that the conditions sought to be remedied by the Virginia statute could not be adequately remedied by mere regulatory provisions. There was evidence to be found in the acts of many States and of the Federal Congress to support the view that discrimination against employees because they did or did not belong to a union was against the public interest and should not be allowed. Laws merely regulating the union obviously would not accomplish that purpose. Basically, agreements involving such discrimination are hostile to our free enterprise system and to individual liberty of choice and action. Legislation that protects the citizen in his freedom to disagree and to decline an association which a majority would thrust upon him on the ground that it knows what is best for him, does no violence to the spirit of our fundamental law. The protection of minorities is the boast of our institutions and a basis of their asserted superiority over totalitarian regimes. The results have demonstrated the value of the democratic process."

Under the policy of "Right to Work" labor unions, management and workers have prospered in this State. Labor-

Management relations have been good and the "climate" thus produced has been conducive to the establishment within the State of new industries which have provided job opportunities to a growing population and strength to the State's economy.

A determination that Agency Shop contracts are permitted under Taft-Hartley and that such contracts are not subject to restriction by State Legislatures would obviously render impotent all State Right to Work legislation. The welfare of Virginia and her citizens demands that such result should not be reached.

QUESTION PRESENTED

The ultimate question presented by the case at bar which we shall hereinafter refer to as *Schermerhorn*, is whether certain State enactments, which protect individual employees from loss of employment for refusal to become "Members" of a union or to pay to such union, as non-members, dues, fees or so-called "service charges," were rendered nugatory by the adoption of the Taft-Hartley Act.

As a preliminary question, the Court will probably be required to determine whether Taft-Hartley permits so-called Agency Shop contracts, even in the absence of state legislation. This question is directly before the Court in *National Labor Relations Board* v. *General Motors Corporation*, No. 404, which we shall hereinafter refer to as *General Motors*.

ARGUMENT

I.

Does Taft-Hartley Permit Agency Shop Contracts?

The brief tendered for filing by the American Federation of Labor, et al., recognizes that the issues presented in

Schermerhorn and *General Motors* are "distinct but interrelated." In our view of the matter, an affirmance of *General Motors* would render it unnecessary for the Court to reach a decision in *Schermerhorn* because the contract involved in *Schermerhorn* is obviously an Agency Shop contract despite the efforts made in the briefs to establish the payments required of employees thereunder as "service fees" rather than payments in lieu of dues. Regardless of this fact, however, it is our view that Sections 7, 8(a)(1), 8(a)(3), and 14(b) of the Taft-Hartley Act are so interrelated that the right of a State to protect its citizens from "Agreements requiring membership in a labor organization as a condition of employment" preserved in Section 14(b) could never be interpreted as not covering an "Agreement requiring membership in a labor organization as a condition of employment" (Note: identical language) *which under Section 7 is the only type Agreement which can affect the employees' right to "refrain from any or all"* assistance to labor organizations.

Thus, while we submit that Section 7 compels the decision reached by the Sixth Circuit in *General Motors*, we likewise contend that *whatever limit* this Court determines for the scope of permissible contracts or agreements under Section 8(a)(3) that limit must also govern the meaning of the term "Agreement requiring membership in a labor organization as a condition of employment", as the term appears in Section 7 and obviously that same meaning must be given the identical term when it appears in Section 14(b). The petitioners made a clever attempt to avoid this result and in so doing, they anticipated a portion of the argument which follows and term it "facile" but charge that it is predicated on "patently unsound assumptions." The petitioners' "complete answer" to the argument is that "Sec-

tion 8(a)(3) sets forth the 'permissive limits' of union security allowed under the Act" (Petitioners' Brief, pg. 40) whereas, they assert, "Section 14(b) does not set forth the 'permissive limits' of state power at all" (Petitioners' Brief, pg. 40). They contend that Section 14(b) merely authorizes the states to create a single narrow exception to Congress' comprehensive regulation of labor relations in interstate commerce" (Petitioners' Brief, pg. 40). As we understand this argument, it runs generally as follows:

(a) Union shop contracts are permitted under 8(a)(3).

(b) The greater includes the lesser.

(c) Agency Shop is "lesser"; therefore

(d) Agency Shop is permitted by 8(a)(3).

The argument continues:

(a) 14(b) is an exception.

(b) the words in an exception must be:

1. "strictly construed" (Petitioners' Brief, pg. 62)
2. "read carefully and exactly" (Petitioners' Brief, pg. 62)
3. "given their normal and customary meaning" (Petitioners' Brief, pg. 60)

At great length Petitioners seek to demonstrate that the term "agreement requiring membership in a labor organization" means "satisfying the requirements for full participation in the legal activities of a private organization governed by its own rules" (Petitioners' Brief, pg. 25).

Let us explore the argument and discover the fallacy. Petitioners make passing reference to Section 7 of the Act on page 17 of their brief and recognize, in a footnote on page 25, that the words "Members" and "Membership" occur in the section. *They do not suggest what the term* "Agreement requiring membership in a labor organization" (the identical term used in (14(b)) *means when it is used in Section 7.* It is therefore, not strange that they have grounded their case on a fatally defective premise.

Petitioners' error is that they regard Section 8(a)(3) as the permissive grant and Section 14(b) as the exception thereto. They overlook the fact that the agreements permitted by Section 8(a)(3) are themselves *exceptions* to the *rights* specifically granted to employees, as individuals, in Section 7.

Section 7 provides:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

Section 8(a)(3) grants no rights. It is specifically cast as a limitation—it defines activities by employers which are unfair labor practices. An examination of its language in conjunction with that of Section 8(a)(1) reveals that it is a reiteration of the *rights* granted to employees in Section 7 and a *determination of permissible exception* to those rights. Those sections are as follows:

"§8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; . . . As amended Sept. 14, 1959 Pub. L.

86-257, Title II, Section 201(e), Title VII, Sections 704(a) (c), 705(a), 73 Stat. 525, 542, 545."

As written, Section 7 would permit a "closed shop" if a "closed shop" were authorized in Section 8(a)(3). This follows because Section 7 contains an exception to the rights of employees to the extent such rights are affected by "agreements requiring membership in a labor organization" as authorized in Section 8(a)(3). Section 8(a)(3), therefore, puts a limitation on the type of agreements that can affect the employees rights under Section 7. Thus all of the petitioners' arguments concerning the strict interpretation of exceptions are applicable to Section 8(a)(3).

In short, the union, petitioner, has interpreted Taft-Hartley as granting to it the right to contract within "permissible limits." But in truth, Taft-Hartley has granted the right to employees to refrain from in any way assisting a labor organization, that right is subject to an exception, which, as petitioners say, must be *strictly construed* and given its *normal* and *customary meaning*. That meaning, according to petitioners' own interpretation of the exact statutory language, does not include an Agency Shop contract.

The final proviso in Section 8(a)(3), which limits the conditions under which an employee can be discharged for nonmembership in the union, does not operate to convert the contract permitted into one not requiring membership in the union. Instead, it only comes into play *after* a permitted union shop contract has been signed. After such contract is signed, the final proviso further protects the employee from discharge if he has tendered to the union the required dues and initiation fees.

In summary, under Sections 7 and 8, the employee has the right to refrain from any and all assistance to a labor

organization except that his right can be affected by a union shop agreement. But even under such agreement, he can only be discriminated against for failure to pay dues and fees. *Union Starch & Refining Co.* v. *Labor Board*, 186 F. 2d 1008, *Radio Officers Union* v. *Labor Board*, 346 U. S. 17.

In the case at bar the contract specifically permits employees not to join. It, therefore, is not a union shop agreement and cannot affect the employees' rights to refrain from assisting any labor organization.

II.

The Right of States To Prohibit Agency Shop Contracts Under Section 14(b)

From the above, it has appeared just what rights there are that Congress was granting to the individual employees —and just what exceptions could be made to those rights. In granting power to the states to prohibit certain agreements (Section 14(b)) Congress chose the exact language it had used to describe the agreements which could affect the employees' rights (Section 7).

Section 14(b) is as follows:

> "Nothing in this act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

Obviously what was intended—and what was done—was to place a Federal exception (Section 8(a)(3)) on the individuals' rights (Section 7) and at the same time provide that the State, if it desired, could prohibit even the Federal

exception (Section 14(b)). If this Court agrees, *Schermerhorn* must be affirmed. For an excellent discussion of this treatment of an Agency Shop contract, see *Amalgamated Ass'n.* v. *Las Vegas-Tenoph-Reno Stage Line,* 202 F. Supp. 726 (1962).

On the other hand, if this Court determines that Agency Shop contracts are invalid under Taft-Hartley, it is academic whether they may be enjoined by a State, although no reason suggests itself why the States should be denied such authority and *Algoma Plywood and Veneer Co.* v. *Wisconsin Board,* 336 U. S. 301, and *Willard* v. *Huffman,* 250 N. C. 396, 109 S. E. 2d 233, Cert. Den. 361 U. S. 893, are authority for the proposition that such jurisdiction remains in the States.

III.

The Purpose of Taft-Hartley

The arguments set forth above are entirely consistent with prior decisions regarding Sections 8(a)(3) and 14(b) and with the legislative purpose in the adoption of Taft-Hartley.

When Congress enacted the Taft-Hartley Law in 1947 it was not for the purpose of enlarging the power of the unions. The reverse was true. The National Labor Relations Act of 1935, known as the Wagner Act, recognized the so-called "closed shop." It was provided in the Wagner Act that employees had the right of self-organization, to bargain collectively through representatives, et cetera (Section 7). The Wagner Act outlined what constituted unfair labor practices on the part of the employer. However, nothing was stated concerning what constituted unfair labor practices on the part of a labor organization (Section 8). As time passed many abuses were committed under this Act, largely by the labor organizations, and some of the States,

including Virginia (January 1947), passed remedial legislation which among other things condemned and prohibited *compulsory unionism*. Conditions worsened to such extent that Congress enacted the Taft-Hartley Law in June 1947. An examination thereof indicates that it could be called the "Federal Right to Work Act." The Act (49 Stat. 452) added this language to Section 7:

> "[A]n (employee) shall also have the *right* to *refrain from* any or all such activities (to form, join, or *assist* labor organizations, etc.) except to the extent that such right may be *affected* by agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of this Title. (Insertions and emphasis supplied.)

Section 8(a)(3) was also amended. The first and only proviso therein under the Wagner Act was amended so that labor agreements could be entered into under which an employee could be required, on pain of discharge, to join a union after the first thirty days of employment. This arrangement is the so-called "Union Shop." This change, standing alone, would have held little benefit for a person desiring to obtain work but unwilling to join a union. All it did was postpone the time for becoming a member. Instead of joining before he was hired, an employee was given thirty days in which to corral the necessary money to meet the dues and initiation fees. Had the amendment stopped there the "right to refrain," newly granted in Section 7, *supra*, would have been entirely meaningless to the prospective employee. He would have been forced to become a member of a union in order to continue his employment thereby being forced to adhere to the principles and membership requirements regardless of how distasteful they might be to him.

However, Congress did further amend the Act by adding the following to Section 8(a)(3):

> "*Provided further*, that no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was *denied* or *terminated* for *reasons other* than the *failure* of the employee to tender the *periodic* dues and the *initiation fee* uniformly required as a condition of requiring or retaining membership." (Italics supplied.)

Section 8 was further amended by setting forth what constituted unfair labor practices on the part of labor organizations. (See, particularly, Section 8(b)(1).)

The effect of the above-quoted proviso was to permit an employee to refrain from all the activities of the labor organization and still hold his job provided only that he paid to the union periodic dues and an initiation fee. Such payments placed him in the identical position of all other employees as far as obtaining and keeping a job was concerned.

Even with the provisos it is clear that the Act was not intended to permit Agency Shop contracts. The constitutionality of such contracts, as they conflict with individual rights, is open to grave question. Senator Taft recognized the difficulty and, in debating the changes to Section 8(a)(3), he said:

> "I should like to say that the rule adopted by the committee is substantially the rule now in effect in Canada. Apparently by a decision of the justices of the Supreme Court of Canada in an arbitration case, the

present rule in Canada is that there can be a closed shop or a union shop, and the union does not have to admit an employee who applies for union membership, but the employee must, nevertheless, pay dues, even though he does not join the union.

"If he pays the dues without joining the union, he has the right to be employed. That, in effect, *is a kind of a tax*, if you please, for union support, if the union is the recognized bargaining agent for all the men, *but there is no constitutional way by which we can do that in the United States.*" 93 Cong. Rec. 4887 (1947). (Emphasis added.)

In short, Senator Taft was saying, that should Congress sanction Agency Shop it would be giving some degree of *statism* to unions.

Realizing that there were many States which had already enacted laws prohibiting compulsory unionism (with recent action by Wyoming there are now 20 Right-to-Work States), the Congress amended the Act by adding Section 14(b) as follows:

"Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial Law."

The object of this amendment was to make it clear that the power to prohibit compulsory unionism was reserved to the States if they saw fit to exercise it. The House Conference Report (H. Conf. Rep. No. 510, 80th Cong., 1st Sess. 60, 1 Leg. Hist. (1947) 564, stated:

"Under the House bill there was included a new Section 13 of the National Labor Relations Act to assure

that nothing in the Act was to be construed as authorizing any closed shop, union shop, maintenance of membership, or *other form of compulsory unionism agreement* in any State where the execution of such agreement would be contrary to State Law. Many States have enacted laws or adopted constitutional provisions to make all forms of compulsory unionism in those States illegal. It was never the intention of the National Labor Relations Act * * * to pre-empt the field in this regard so as to deprive the States of their powers to prevent compulsory unionism. * * * To make certain that there should be no question about this, Section 13 was included in the House bill. *The Conference Agreement, in Section 14(b), contains a provision having the same effect.*" (Italics supplied.)

Further evidence of legislative intent is found in the actions surrounding the 1959 amendment to those sub-sections of the Act found in Section 302. An attempt was made to alter the "check-off" provisions so as to make it legal for the employer to withhold and pay over to the union, not only dues, but also "periodic payments to the union." In other words, an attempt was made to require employers to collect non-member payments under Agency Shop contracts. The attempt was defeated. In *Amalgamated Ass'n. v. Las-Vegas-Tonaph-Reno Stage Line, supra,* the Court sets forth the legislative history of the 1959 attempt with great detail and clarity. We respectfully direct the Court's attention to the opinion.

As to whether Section 14(b) was intended to permit states to outlaw Agency Shop contracts the record is replete. During debate on the 1959 attempt to amend the "Check-off" Senator Barry Goldwater said:

"The bill permits the checkoff of fees paid in lieu of dues to a labor union. This tacitly recognizes that the

so-called agency shop is lawful. The agency shop is a device now being used in an attempt to circumvent the right-to-work laws in several states, by requiring a periodic payment to the union for its services as collective bargaining agent without requiring the employee to join the union. *Its effect, in practical terms, is exactly equivalent* to what is now permitted by way of union security under the Taft-Hartley Act, *but which it was the intention of Congress to permit the States to prohibit.*" (Emphasis added) (See 105 Cong. Rec. 6848 or II Legislative History of the Labor Management Reporting and Disclosure Act of 1959, 1271.)

As a final historical note we would point out Senator Taft's statement as to the purpose of Section 14(b). As a sponsor of the legislation and a member of the Senate-House Conference Committee which approved the final version, his views are particularly significant. Senator Taft said of Section 14(b):

> "Many States have enacted laws or adopted constitutional provisions to make *all forms of compulsory unionism in such States illegal.* As stated in the report accompanying the Senate committee bill, it was not the intent to deprive the States of that power * * *". (Emphasis added) (Cong. Rec., Senate, June 6, 1947, pg. 6675.)

The legislative history demonstrates no intent to legalize Agency Shop contracts, as such, even though in practical effect union shop contracts, under the proviso in Section 8(a)(3) operate on the employee as the equivalent of Agency Shop contracts. Congress provided that until union and employer agreed on a full union shop contract nothing less could affect the employees' rights under Section 7.

The legislative history demonstrates without question

that Section 14(b) left with the States full power to prohibit all forms of compulsory unionism . . . including Agency Shop contracts.

CONCLUSION

For the reasons stated herein and for the reasons set forth in the brief filed on behalf of the State of Florida with which we concur it is respectfully submitted that this Court should not disturb the actions of the Courts of the State of Florida which were taken in an effort to protect the individual rights of citizens of Florida, which rights are fully recognized by Federal law.

Respectfully submitted,

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APPENDIX

Chapter 4, Title 40
Code of Virginia (1950)

ARTICLE 3

Denial or Abridgment of Right to Work

§ 40-68. *Policy of article.*—It is hereby declared to be the public policy of Virginia that the right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization. (1947, p. 12; Michie Suppl. 1948, § 1887(113).)

This article does not violate any provision of the federal or Virginia Constitution.—Finney v. Hawkins, 189 Va. 878, 54 S. E. (2d) 872.

§ 40-69. *Agreements or combinations declared unlawful.*—Any agreement or combination between any employer and any labor union or labor organization whereby persons not members of such union or organization shall be denied the right to work for the employer, or whereby such membership is made a condition of employment or continuation of employment by such employer, or whereby any such union or organization acquires an employment monopoly in any enterprise, is hereby declared to be against public policy and an illegal combination or conspiracy. (1947, p. 12; Michie Suppl. 1948, § 1887(114).)

§ 40-70. *Employers not to require employees to become or remain members of union.*—No person shall be required by an employer to become or remain a member of any labor union or labor organization as a condition of employment or continuation of employment by such employer. (1947, p. 12; Michie Suppl. 1948, § 1887(115).)

§ 40-71. *Employers not to require abstention from membership in union.*—No person shall be required by an em-

ployer to abstain or refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment. (1947, p. 12; Michie Suppl. 1948, § 1887(116).)

§ 40-72. *Employer not to require payment of union dues, etc.*—No employer shall require any person, as a condition of employment or continuation of employment, to pay any dues, fees or other charges of any kind to any labor union or labor organization. (1947, p. 12; Michie Suppl. 1948, § 1887(117).)

§ 40-73. *Recovery by individual unlawfully denied employment.*—Any person who may be denied employment or be deprived of continuation of his employment in violation of §§ 40-70, 40-71 or 40-72 or of one or more of such sections, shall be entitled to recover from such employer and from any other person, firm, corporation or association acting in concert with him by appropriate action in the courts of this Commonwealth such damages as he may have sustained by reason of such denial or deprivation of employment. (1947, p. 12; Michie Suppl. 1948, § 1887(118).)

§ 40-74. *Application of article to contracts.*—The provisions of this article shall not apply any lawful contract in force on April thirtieth, nineteen hundred and forty-seven, but they shall apply in all respects to contracts entered into thereafter and to any renewal or extension of an existing contract. (1947, p. 12; Michie Suppl. 1948, § 1887(119).)

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No. [illegible] 13

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL 1625, AFL-CIO, and WILLIAM TRAVIS, President of Retail Clerks International Association, Local 1625, AFL-CIO,

Petitioners,

v.

ALBERTA SCHERMERHORN, LOIS DEVITA, JOYCE E. THURO, and LARRY STARK,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF FOR THE RESPONDENTS

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In The
Supreme Court of the United States

October Term 1962

No. 368

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL 1625, AFL-CIO, and WILLIAM TRAVIS, President of Retail Clerks International Association, Local 1625, AFL-CIO,

Petitioners,

v.

ALBERTA SCHERMERHORN, LOIS DEVITA, JOYCE E. THURO, and LARRY STARK,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF FOR THE RESPONDENTS

QUESTION PRESENTED

Whether Congress, in enacting the Taft-Hartley Act and Section 14(b) thereof, intended to deprive right-to-work states of the authority to prohibit the execution and application of the Agency Shop compulsory unionism agreement?

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED

Section 12 of the Declaration of Rights of the Florida Constitution (§12, 25 Fla. Stat. Ann.) provides as follows:

> The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union, or labor organization; provided, that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer.

Section 14(b) of the National Labor Relations Act (61 Stat. 151, 29 U.S.C. §164) provides as follows:

> Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

STATEMENT OF THE CASE

The statement of facts set forth in the petitioner's brief is misleading and does not accurately present the true picture. In addition to numerous excursions into matters completely outside the Record, petitioner in its Statement of the Case, and throughout its brief, attempts to give the false impression that the agreement which gave rise to this litigation is not an "Agency Shop Agreement", but simply an arrangement whereby non-union employees are required to pay "service fees" for specific services rendered to them, and that such "service fees differ in purpose, use and amount from the dues and fees paid by the members of the union." (Petitioner's brief, pp. 31, 32, 57).

The brief filed by the AFL-CIO and the United Auto Workers as Amici Curiae similarly misrepresents that the fees required in the present case are for specific services rendered, and that these fees are different in character from the "Agency Shop" fees involved in the *General Motors case*, No. 404, now pending before this Court.

The inaccuracy of such representations may be seen from the actual Record which shows the following facts:

The collective bargaining agreement entered into on October 4, 1960, between petitioner, Retail Clerks Union, and Food Fair, Inc., contains a clause entitled "Agency Shop Clause" (R. 9), reading as follows:

"AGENCY SHOP CLAUSE"

"Employees shall have the right to voluntarily

join or refrain from joining the union. Employees who choose not to join the union, however, and who are covered by the terms of this contract, shall be required to pay as a condition of employment, an initial service fee and monthly service fees to the union for the purpose of aiding the union in defraying the costs in connection with its legal obligations and responsibilities as the exclusive bargaining agent of the employees in the appropriate bargaining unit. The aforesaid fees shall be payable on or before the first day of each month, and such sums shall in no case exceed the initiation fees and the membership dues paid by those who voluntarily choose to join the union. Other than the payment of these service fees, those employees who do not choose to join the union shall be under no further financial obligations or requirements of any kind to the union. It shall also be a condition of employment that all employees covered by this Agreement shall on the thirtieth day following the beginning of such employment or the effective date of this Agreement, whichever is later, pay established initial and monthly service fees as shown above." (R. 13).

Following the execution of the aforesaid agreement, the Company and the union jointly posted a notice addressed to all employees bearing the heading, "IMPORTANT NOTICE TO EMPLOYEES (AGENCY SHOP PROVISION)". The "important" notice recited that a new collective bargaining contract had been entered into and that "Article 19 of the Agreement provides for the

establishment of an Agency Shop", and that a "few words of explanation may be in order". The notice went on to state,

> "Even though you may not have joined the union, you are obligated under the provisions of the Agency Shop, to pay an "initial service fee which is the **equal** of the initiation fee for union members and a monthly service fee which is the **equal** of the monthly dues for those who voluntarily became union members." (R. 7). (Emphasis added).

Respondents, four non-union employees of Food Fair, Inc., filed a complaint in equity in the Circuit Court of Dade County, Florida, seeking a declaratory judgment that the "Agency Shop" clause violated the "Right-to-Work" guarantee of the Declaration of Rights of the Florida Constitution, Section 12, and requested an injunction to restrain the union and Food Fair from enforcing the provisions of the Agency Shop clause. Attached to the complaint were two exhibits, the Agency Shop clause of the contract, and the "important" notice to employees set forth above.[1]

A motion to dismiss the complaint was filed by all of the defendants on two grounds; first, that the matter

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[1]Petitioner's brief describing the proceedings in the trial court erroneously keeps referring to the plaintiff-respondents complaining of a "service fee" arrangement (pp. 5, 6). The fact is that the respondents' complaint referred solely to the "Agency Shop" provision using the same term used by the union in the Agreement and in the notice affixed to the complaint as Exhibit "A". Also, the Record further shows that petitioner in its Response to application for temporary injunction, referred solely to the Agency Shop in four places, and never used the term "service fee". (R-11, 12).

was one within the exclusive jurisdiction of the National Labor Relations Board, and second, that the complaint did not state a cause of action in that the Agency Shop provision did not violate the Right-to-Work provision of the Florida Constitution. (R. 9)

The trial court granted the motion to dismiss, stating:

> "The Complaint . . . is hereby dismissed for the reason that the court finds that the agency shop clause, Section 2, Article 19 of the contract between the defendant union and defendant Food Fair, is not violative of the Florida "Right-to-Work" law as contained in Section 12 of the Declaration of Rights of the Constitution of Florida."[2] (R. 15)

The cause was appealed by the plaintiffs, respondents herein, to the District Court of Appeal, Third District. The District Court of Appeal heard arguments and filed an opinion in which the "Final Judgment" of the trial court was reversed and the cause remanded. Before that decision became final, the appellees (petitioner herein) filed a motion to the court to withdraw its opinion and transfer the appeal to the Florida Supreme Court, asserting that the appeal should have been made directly to the Supreme Court, because the decision was "one construing a controlling provision of the Florida Constitution". The District Court granted the motion and transferred the

[2]Under established Florida Rule of Civil Procedure 1.8, (similar to Federal Rule 12(b), "when a motion to dismiss is denied, movant is then required to file an answer incorporating any and all defenses and the cause then arrives at issue". The Record before this Court and the Florida Appellate Court does not contain an Answer by the petitioner.

cause to the Supreme Court, and entered an order withdrawing its opinion, conditioned upon the Supreme Court accepting jurisdiction. The Supreme Court determined that it had the requisite appellate jurisdiction.

After oral argument and due deliberation, the Supreme Court held that the Agency Shop contract provision violated the state's Right-to-Work constitutional safeguard, adopted in **haec verba** the vacated decision of the District Court, and remanded the cause back to the trial court for further proceedings not inconsistent with their opinion. (R. 24-34). After petitioner notified the Florida Supreme Court of its intention to petition this Court for a writ of certiorari, the Florida Supreme Court stayed the issuance of its mandate to the trial court.[3]

In the proceedings before the Florida Supreme Court, as in the prior proceedings, the union raised the issue of exclusive federal jurisdiction. The Supreme Court rejected this contention on the ground that section 14(b) of the Taft Hartley Act preserves the jurisdiction of the states in matters involving state "right-to-work" provisions, and stated:

"It is true that section 14(b) specifically deals

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[3]The petitioner has ingeniously, by means of a voluminous footnote on pages 8 and 9 of its brief, sought to create facts that are not part of the Record and are grossly in error. Confining review of this case strictly to the Record as contemplated by the Rules, we must state that the petitioner's fictitious facts are grossly inaccurate, unsupported by any record, and that the footnote references to matters dehors the Record should be disregarded by this Court.

It should also be noted that petitioner's brief throughout constantly alludes to matters not found in or supported by the Record. (See p. 9 of petitioner's brief wherein petitioner states that the "bulk of the missing parts of the Record proved . . .").

only with "agreements requiring **membership** in a labor organization as a condition of employment . . ." However, it is not to be presumed that Congress would preserve to the states the field of right-to-work legislation, while, at the same time, intending that unions and management could, by the use of subterfuge of an agency shop clause, circumvent and, in effect, nullify a paramount provision of the organic law of any of the several states." (R. 24).

The correctness of this ruling of the Supreme Court of Florida on the federal pre-emption question, insofar as it relates to the Agency Shop, is the sole question presented herein. Petitioner's brief erroneously states the question as relating to an alleged "service fee clause" rather than an Agency Shop. The petitioner's questions in its brief bearing the date of January 30, 1963, were not presented to the Florida courts, and are not the same as the questions presented to this Court in the petition for writ of certiorari submitted August 24, 1962.

SUMMARY OF ARGUMENT

Congress intended, in section 14(b) of the Taft-Hartley Act, to preserve the jurisdiction of the states in matters involving union security agreements. An interpretation of section 14(b) that would permit the agency shop form of agreement to circumvent and, in effect, nullify what section 14(b) seeks to preserve, would render that section meaningless.

Although section 14(b) refers to "agreements requiring **membership** in a labor organization", the phrase is

used as a generic term covering all forms of union security agreements. This is clearly shown by the legislative history of the Taft-Hartley Act, wherein Congress unequivocally indicated that section 14(b) was included "to assure nothing in the Act was to be construed as authorizing any closed shop, union shop, maintenance of membership, **or other form of compulsory unionism agreement.**"

Section 14(b) would be bereft of meaning if it were construed as leaving to the states only the regulation of agreements requiring **membership** in a literal sense, because the enforcement of a **membership** requirement is prohibited by the federal Act itself. Under the narrow interpretation thus suggested by petitioner, section 14(b) would leave to the states only the authority to go through the useless motions of prohibiting that which is already unlawful under federal law. The Solicitor General of the United States and the National Labor Relations Board recognize this fact, and have relied upon it in their argument before this Court in the *General Motors* case.

The exclusive jurisdiction rule adopted in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), and other pre-emption cases, does not affect the right of the states to regulate Agency Shop agreements. Such agreements are not, even arguably, a protected activity under the National Labor Relations Act. On the contrary, if such agreements are permitted at all, they are permitted only as an exception to the basic right guaranteed employees "to form, join or assist labor organizations", or "to refrain from any or all such activities". The National Labor Relations Act merely "disclaims a national policy hostile to union security agreements"—it does not **protect** them.

The Agency Shop agreement here involved is no different, in substance, from that involved in the *General Motors* case, notwithstanding petitioner's fictionalized description to the contrary. The essential element in each case is the requirement that non-union employees pay to the union the equivalent of the union initiation fees and monthly dues. Accordingly, if, as held by the Sixth Circuit Court of Appeals in *General Motors*, the Agency Shop form of agreement is unlawful under the federal Act, the question of whether the states can prohibit such agreements is purely academic. If, on the other hand, Agency Shop agreements are permissible under the federal law, they are permissible only if not prohibited under state law.

Petitioner's contention that the parallel references to agreements requiring "membership as a condition of employment", in section 8(a)(3) and section 14(b) are to be construed in the one case as including Agency Shop agreements, but in the other, as not including such agreements, is a completely contrived effort to ascribe different meanings to the same words—semantic legerdemain—and nothing more. If these parallel phrases were intended to have different meanings, Congress most certainly would have clearly manifested such intention.

Petitioner's substitution of the term "Service Fee" as a new name for the Agency Shop payments required under the Agency Shop Clause of the contract here involved does not change the nature, purpose and effect of these payments. This substitution of names merely raises a false and fictitious issue.

ARGUMENT

I.

THE LEGISLATIVE HISTORY OF SECTION 14(b) OF THE TAFT-HARTLEY ACT CONCLUSIVELY SHOWS THAT CONGRESS INTENDED TO LEAVE UNION SECURITY AGREEMENTS OF ALL TYPES FOR REGULATION BY THE STATES.

The term "Agency Shop" is of recent origin, having come into use only within the past ten years. At the time the Taft-Hartley Act was enacted in 1947, the term was unknown, and for this reason, there is no reference to it anywhere in the reports and debates leading to passage of the Act. The three forms of union security agreements in use at that time were the closed shop, the union shop; and maintenance of membership, all of which called for membership in the union.

Florida, the first state to enact a right-to-work law, adopted its constitutional amendment in 1944. Several other states immediately followed suit, and prior to passage of the Taft-Hartley Act, at least six of these right-to-work states expressly prohibited any requirement **for payment of dues, fees or charges of any kind** to a labor union as a condition of employment.[4]

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[4]The Virginia right-to-work law, section 40-72, Virginia Code, provided: "No employer shall require any person, as a condition of employment or continuation of employment to *pay any dues, fees or other charges* of any kind to any labor union or labor organization." North Carolina's Statute (section 95-82) contained identical wording.

The Georgia right-to-work law (Georgia Code, section 54-903) stated: "No individual shall be required as a condition of employment

Congress was aware of the broad language of these state laws, and clearly indicated that the purpose of section 14(b) was to assure that nothing in the Taft-Hartley Act would interfere with the application and enforcement of such state restrictions. For example, Senator Taft, sponsor of the legislation in the Senate, and a member of the Senate-House Conference which approved the final version, explained the purpose of section 14(b) as follows:

> "Many states have enacted laws or adopted constitutional provisions to make **all forms** of compulsory unionism in such states illegal. As stated in the report accompanying the Senate Committee bill, it was not the intent to deprive the states of that power . . . " (Cong. Rec. Senate, June 6, 1947, p. 6675). (Emphasis added).

House Report No. 245, reporting on the House version, H.R. 3020, made reference to the right-to-work laws of twelve states, including those which restricted agree-

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or continuance of employment, to *pay any fee, assessment or other sum of money whatsoever* to a labor organization."

The Tennessee Code (section 50-210) provided: "It shall be unlawful for any person, firm, corporation or association of any kind to exclude from employment any person by reason of such person's payment of or failure *to pay dues, fees, assessments, or other charges* to any labor union or employee organization of any kind".

The Iowa Code (section 736 A.4) stated: "It shall be unlawful for any person, firm, association, labor organization or corporation or political subdivision, either directly or indirectly, or in any manner or by any means as a prerequisite to or condition of employment to require any person *to pay dues, charges, fees, contributions, fines or assessments* to any labor union, labor association or labor organization."

The Arkansas Constitution (Amendment 34) provided that no person shall be denied employment because of membership or non-membership in a labor union, "nor shall any person against his will *be compelled to pay dues* to any labor organization as a prerequisite to or condition of employment." (Emphasis added throughout.)

ments requiring **payment of any dues, fees, or other charges,** and went on to state that section 14(b) declares the subject of compulsory unionism one that the states may regulate concurrently with the United States **"notwithstanding that the state laws limit compulsory unionism far more drastically than does federal law."** (House Report No. 245, 80th Cong.) (Emphasis added).

The report of the managers on the part of the House stated with reference to section 13 of the House bill (H.R. 3020) and section 14 of the Conference Committee amendments:

> "Under the House bill there was included a new Section 13 of the National Labor Relations Act to assure that nothing in the Act was to be construed as authorizing any closed shop, union shop, maintenance of membership, or **other form of compulsory unionism agreement** in any state where the execution of such agreement would be contrary to state law. **Many states have enacted laws or adopted constitutional provisions to make all forms of compulsory unionism in those states illegal.** It was never the intention of the National Labor Relations Act, as is disclosed by the legislative history of that Act, to preempt the fields in this regard so as to deprive the states of their powers to prevent compulsory unionism . . . To make certain that there should be no question about this, Section 13 was included in the House bill. The Conference Agreement, in Section 14(b), contains a provision having the same effect." (93 Cong. Rec. June 4, 1947, p. 6378). (Emphasis added).

House Conference Report No. 510, 80th Congress, stated:

> "Under the House bill there was included a new Section 14(b) of the National Labor Relations Act to assure nothing in the Act was to be construed as authorizing any closed shop, maintenance of membership, **or other form of compulsory unionism agreement** in any state where the execution of such agreements would be contrary to state law."

In spite of these extremely clear and conclusive expressions of Congressional intent, petitioner, in its brief, attempts to convey a completely different impression of the legislative history. In so doing, it disregards the above-cited statements of the sponsors of the legislation and the Committee Reports, and quotes, instead, fragmentary comments by opponents of the legislation, such as Senator Morse and Senator Pepper. Such a method of establishing the intent and meaning of the statutory words is hardly in accord with accepted principles of statutory construction.[5]

If any reinforcement of the intent of Congress to leave Agency Shop agreements for state regulation were needed, it may be found in the legislative history of the

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[5]Petitioner makes reference to a comment by Senator Taft in a Senate debate to the effect that the bill reported by the Conference Committee " would not invalidate the provisions of a state law prohibiting the closed shop." Petitioner argues, apparently, that this shows an intent to limit state authority only to prohibiting the closed shop. This is so completely out of context with the purpose of section 14(b) as explained elsewhere by Senator Taft, and in Committee Reports, it is difficult to understand why petitioner has made reference to it. (Petitioner's brief, p. 43).

Landrum-Griffin Act amendments to the Taft-Hartley Act adopted by Congress in 1959, Public Law 257, 86th Cong. 73 Stat. 519. Among other sections of the Taft-Hartley Act affected by these amendments, was section 302 which makes it unlawful for an employer to pay any money or other thing of value to any representative of a labor organization representing his employees, except for certain designated specific purposes, one of which is "money deducted from the wages of employees in payment of membership dues in a labor organization . . . ." Union supported efforts to amend this section to authorize payment of Agency Shop fees, as well as membership dues, were made in both the Senate and the House, but were unsuccessful.

The Kennedy-Ervin bill, S-1555, passed by the Senate on April 25, 1959, contained an amendment to section 302(c)(4) which would make that section read; "Money deducted from the wages of employees in payment of membership dues in **or other periodic payments to a labor organization in lieu thereof.**" (See Legislative History of the Labor Management Reporting and Disclosure Act of 1959, 52.) Senator Goldwater criticized this amendment, both in the Senate and in an appearance before the House Committee on Education and Labor, at which time he informed that Committee:

> "In another section the (Senate) bill would tighten the hold of compulsory unionism on the Nation by recognizing as legitimate a practice which has come to be known as the agency shop . . . This practice is being utilized increasingly in right-to-work states to achieve the equivalent of the type of union-security arrangement which

is permitted under the Taft-Hartley Act but which it was the intention of Congress in that statute to authorize the states to prohibit if they so wished." (Hearings, Joint Sub-Committee of the House Committee on Education and Labor, 86th Cong. 1st Sess., on H.R. 3540, H.R. 3302, H.R. 4473, H.R. 4474 and related bills regarding labor-management reform legislation, part 4, at page 1628 (1959)).

Following Senator Goldwater's appearance, the House Committee struck out the proposed Senate amendment to section 302(c)(4), and the House bill, H.R. 8342, passed the House without this amendment. An effort to restore the proposed amendment was defeated on the House floor. (Cong. Rec. August 14, 1959, p. 14538) (Legislative History, 1699). The Conference Committee adopted the House version, and the bill as finally passed did not contain this controversial amendment to section 302. Thus, Congress rejected this amendment which would, as Senator Goldwater pointed out, give tacit approval to Agency Shop agreements in states which had adopted laws prohibiting all forms of compulsory unionism. Such a rejection is valid evidence that Congress regards the Agency Shop as a matter subject to regulation by the states and desires to make no change in this respect. Resort to subsequent legislative action of this type may properly be utilized as an aid in determining the legislative intent of the original Act. See *Madden v. Transit Employees Union*, 147 F. 2d 439 CA 4 (1945).

In the case of *Amalgamated Association Motor Coach Employees v. Las Vegas-Reno-Tonopah Stage Lines*, DC Nev., 202 F. Supp. 726 (1962), the District Court had

before it the question of whether an Agency Shop agreement was permitted under the Nevada Right-to-Work law, and whether the state could, under section 14(b) of the Taft-Hartley Act, prohibit such an agreement. After reviewing the legislative history of section 14(b), and the attempted amendment of section 302, referred to above, the Court held:

> "We are convinced that under the Taft-Hartley Act, there is no meaningful distinction between the type of union security which is provided for in the proviso to section 8(a)(3) and the union security which is provided for in the Agency Shop contract at bar. Any distinction which does exist is purely a matter of form. . .
>
> Although it is true that section 14(b) literally only gives the states the right to outlaw agreements which make 'membership' in a union compulsory, we are convinced that we would be frustrating the clear congressional purpose and creating an utterly absurd result if we were to hold that literalness should be exalted to a point where the states were denied the right to ban the Agency Shop as well. Section 14(b) would be bereft of meaning if we were to construe it in a fashion which would render the states powerless to make illegal that type of union security which imposes liabilities on the working man which, realistically, are the same liabilities which, under the section, the states may remove."

A similar construction of the intent and meaning

of section 14(b) as shown by the legislative history, was reached by the Supreme Court of Kansas in holding that Agency Shop agreements are invalid under the Kansas Right-to-Work Law. *Higgins v. Cardinal Manufacturing Co.*, 188 Kan. 11 (1961), 360 P 2d 456, cert. den. 368 U.S. 829 (1962). See also *Sheet Metal Workers v. Nichols*, 89 Ariz. 187, 316 P. 2d 204 (1961).

II.

SECTION 14(b) WOULD BE BEREFT OF MEANING AND PURPOSE IF UNDER IT THE STATES HAVE ONLY THE AUTHORITY TO PROHIBIT AGREEMENTS REQUIRING MEMBERSHIP IN A LITERAL SENSE.

Petitioner's contention that section 14(b) of the Taft-Hartley Act permits the states to regulate agreements requiring labor union "membership" and nothing more, would leave the states without any meaningful authority in regard to regulation of compulsory unionism, for the reason that the National Labor Relations Act itself prohibits the enforcement of any requirement of "membership" as a condition of employment.

The authorization for union security agreements contained in section 8(a)(3) of the Act, reads as follows:

> "Section 8.(a) It shall be an unfair labor practice for an employer . . .
>
> * * *
>
> (3) by discrimination in regard to hire or

tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

Provided, that nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later . . ."

This language of section 8(a)(3) is followed immediately by the proviso that an employer may not discharge an employee for any reason "other than the failure of the employee to tender periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." Under this proviso, an employee can refuse to join or to remain a member of the union, but so long as he tenders the required amount of dues and fees exacted by the union, he cannot be discharged.

It has been repeatedly held by the courts and by the National Labor Relations Board that an agreement requiring "membership" in a strict sense, or one under which an employee could be discharged for "non-membership", is prohibited under section 8(a)(3). The only requirement permitted under section 8(a)(3) is the payment of money. In *Radio Officers Union v. NLRB*, 347 U.S. 17 (1954), this Court stated that section 8(a)(3) clearly indicates:

". . . that Congress intended to prevent the utilization of union security agreements for any pur-

pose other than to compel payment of dues and fees."

Numerous other cases construing section 8(a)(3) have held that the only compulsion permitted under this section is the payment of money, and that a requirement for "membership" cannot be enforced. *Union Starch & Refining Co., v. NLRB*, 186 F. 2d 1008, CA 7 (1951); *NLRB v. Philadelphia Iron Works*, 211 F. 2d 937 CA 3 (1953).

Petitioner contends, however, that section 8(a)(3) requires something more than simply the payment of dues and fees; tht it in fact requires a willingness on the part of an employee to join the union. The tender of union dues, petitioner contends, is only a manifestation of the employee's willingness to be a member of the union. In support of this argument, petitioner points out that in the *Union Starch* case, supra, the National Labor Relations Board concluded that the employees who had refused to sign union membership applications, take the oath required of union members, or attend the union meetings were, nevertheless, "willing" to join the union but were simply unwilling to comply with these other conditions of membership.

It must be said that this is a rather strange use of the word "willing", and one that is not supported by any authoritative court decisions. In numerous cases involving section 8(a)(3), it has been held that employees who have flatly refused to join, or who have unequivocally resigned from the union, need only tender the union dues to protect their jobs. *NLRB v. Pape Broadcasting Co.*, 217 F. 2d 197 CA 5 (1954); *NLRB v. International Association of Machinists*, 203 F. 2d 173 CA 9 (1953). This

latter case involved the legality of the discharge of an employee whose antipathy toward the union was carried to the extent of starting a campaign to oust the union as bargaining agent. Although he tendered the required amount of union dues, the union obtained his discharge for non-membership. The National Labor Relations Board found that such discharge was unlawful under section 8(a)(3), and its order directing the reinstatement of the employee was affirmed by the Court of Appeals. It is thus difficult to see how it could be said that the tender by an employee of the union dues in such a case manifested a willingness to become or remain a member of the union, as contended by petitioner.

It is abundantly clear, therefore, that while section 8(a)(3) may permit an employer and a union to enter into an agreement containing a compulsory membership clause, it prohibits enforcement of the membership requirement. All it permits is the enforcement of an obligation to pay the equivalent dues and fees.

For practical purposes, then, compulsory membership as a condition of employment is outlawed by the National Labor Relations Act, and if, as petitioner contends, section 14(b) leaves to the states only the authority to prohibit compulsory membership in literal terms, Congress left nothing to the states other than the empty right to enact laws prohibiting that which is already prohibited under the federal law. Section 14(b) would thus have no real meaning, its inclusion in the Taft-Hartley Act would have been a meaningless gesture, and the extensive discussion of the purpose of section 14(b) in the legislative history, as referred to hereinabove, was a complete waste of Congress' time and energy.

It follows that for section 14(b) to have any meaning it can only be construed as preserving to the states the authority to regulate the same forms of union security agreements as are authorized or permitted under section 8(a)(3). This obvious conclusion was pointed out by the Supreme Court of Kansas in *Higgins v. Cardinal Manufacturing Co.*, supra, and by the United States District Court in *Amalgamated Association v. Las Vegas-Reno-Tonopah Stage Lines*, supra, See also *Sheet Metal Workers International Assn. v. Nichols*, supra, and *Meade Electric Co. v. Hagberg*, 129 Ind. App. 631, 159 N.E. 2d 408 (1959), in which the question of state authority to regulate Agency Shop clauses was similarly raised.

The National Labor Relations Board and the Solicitor General of the United States have similarly taken the position that "section 14(b) was aimed at preserving for the states the same freedom which they had previously enjoyed to regulate all forms of compulsory support for labor organizations . . . Accordingly, section 14(b) has been held to authorize state prohibition of Agency Shop agreements." (See Brief for NLRB in the *General Motors* case, No. 404, now pending before this Court, p. 37). Any other construction would, as pointed out above, deprive section 14(b) of any meaningful substance and lead to an absurd conclusion.

III.

AGENCY SHOP AGREEMENTS ARE NOT EVEN "ARGUABLY" A PROTECTED ACTIVITY UNDER THE NATIONAL LABOR RELATIONS ACT, AND ARE THUS NOT WITHIN THE EXCLUSIVE JURISDICTION RULE STATED IN SAN DIEGO BUILDING TRADES COUNCIL v. GARMON.

Petitioner contends that state authority to regulate Agency Shop agreements is incompatible with the decision of this Court in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), wherein this Court stated:

> "When it is clear or may fairly be assumed that the activities which a state purports to regulate are protected by section 7 of the National Labor Relations Act, or constitute an unfair labor practice under section 8, due regard for the federal enactment requires that state jurisdiction must yield."

On the basis of this language in *Garmon*, petitioner urges that the Agency Shop agreement involved in this case, as well as the parties' conduct pursuant thereto, constitute protected activity within the scope of section 7 of the Act, and are thus subject to exclusive federal jurisdiction.

This contention, as will be seen, is based upon an improper reading of the *Garmon* decision. In the first place, that case did not involve the question of union security agreements or state right-to-work laws in any shape, man-

ner or form. It involved an action brought by a lumber company against a group of labor unions to recover damages arising from unlawful picketing of the company's premises. The company first filed an unfair labor practice with the National Labor Relations Board, charging that the union picketing violated section 8 of the National Labor Relations Act. The Board's general counsel refused to issue a complaint in this case, and the company was thereby blocked from any hope of getting relief through the Board. It then filed suit in a California state court alleging the identical conduct by the unions. The state court held that this conduct constituted tortious conduct under state law, and awarded damages to the company. The judgment was affirmed by the Supreme Court of California and a petition for certiorari was granted by this Court.

In reversing the decision of the California Court, this Court stated:

> "The adjudication in California has throughout been based on the assumption that the behavior of the petitioning unions constituted an unfair labor practice. This conclusion was derived by the California courts from the facts as well as from their view of the Act. It is not for us to decide whether the National Labor Relations Board would have, or should have decided these questions in the same manner. When an activity is arguably subject to section 7 or section 8 of the Act, the states as well as the federal courts must yield to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." (p. 245).

It can thus be seen that in *Garmon* the California courts were dealing with a specific type of picketing which is expressly described in section 8, and which may or may not constitute an unfair labor practice under section 8, depending upon the purpose for which it is carried on. The determination of its character as either an unfair labor practice or as a permissible type of picketing, this Court held, was a function which Congress entrusted to the National Labor Relations Board, and the failure or refusal of the Board's general counsel to issue a complaint did not, of itself, clothe the state courts with jurisdiction over such conduct. It was in this context that the Court used the phrase "arguably subject to section 7 or section 8", and to regard this language as creating an all-embracing and totally pervasive extension of federal jurisdiction to any and every action which in the most remote way could "arguably" be subject to the federal Act would lead to ridiculous results.

Nonetheless, petitioner contends that this language must, in this instance, be construed as striking down the right of the states to enforce restrictions on compulsory unionism, which, as hereinabove pointed out, Congress clearly intended to leave to the states. In spite of such Congressional intent, petitioner urges, the Agency Shop form of union security here involved is "arguably protected" under the federal Act, and thus beyond the reach of state jurisdiction. However, from the regulatory scheme of the National Labor Relations Act, it is clear that Agency Shop agreements, as well as other forms of compulsory unionism, are not even "arguably" protected forms of activity.

Beginning with the original Wagner Act, there was

no Congressional intent under that Act to either protect or prohibit union security agreements of any kind, and the states were free to apply their own laws in this field. *Algoma Plywood & Veneer Co., v. Wisconsin Employment Relations Board*, 336 U.S. 301 (1949). In *Algoma*, the Court pointed out that although section 8 (3) of the Wagner Act authorized compulsory unionism agreements, such authorization under federal law did not affect the power of the states to restrict them, because "Section 8(3) merely disclaims a national policy hostile to the closed shop or other forms of union security agreements." It is thus clear that there was no intent under the Wagner Act to treat such agreements as a form of protected activity.

The Taft-Hartley Act amendments to the Wagner Act in 1947, continued the authorization for agreements requiring membership in a labor organization as a condition of employment, but narrowed its permissible limits so as to exclude closed shop agreements and, as pointed out heretofore, to prohibit the discharge of an employee for any reason other than payment of union dues and fees. There is nothing in the Taft-Hartley Act amendments or in the legislative history to show that by these changes Congress intended to federally "protect" any form of compulsory unionism agreement. Compulsory unionism agreements have been given no greater status under the amended Act than they had under the Wagner Act, and to the extent that any form of compulsory unionism is "permitted" under the amended Act it is only "permitted" and nothing more. The Act does not provide any guarantee or establish any other form of sanction for such agreements, and they are not, therefore, to be treated as a class of protected activity under federal law.

It remains to be decided whether Agency Shop agreements are a "prohibited" form of activity under section 8(a)(3) of the Act. This question is now before this Court in the *General Motors* case, and respondents herein take no position on this point. Respondents contend only that if Agency Shop agreements are not prohibited under section 8(a)(3), they are, as pointed out above, merely "permitted" rather than "protected".

Petitioner also contends, apparently, that even if the states have authority to adopt right-to-work laws restricting compulsory unionism, they lack the power to enforce such laws because any conduct which gives rise to a violation of a right-to-work statute is also a violation of section 8 of the National Labor Relations Act. In support of this contention petitioner cites *Local 438, Construction Laborers v. Curry*, 83 S. Ct. 31, decided Jan. 21, 1962; *DeVries v. Baumgartner Construction Co.*, 359 U.S. 498 (1959); and *Electrical Workers v. Farnsworth and Chambers Co.*, 353 U.S. 969 (1957). An analysis of these cases will show that they do not support the conclusion which petitioner attempts to draw from them.

In the *Curry* case cited by petitioner, the Supreme Court of Georgia ruled that peaceful picketing which had for its purpose the enforcement of payment of prevailing wages and exclusive hiring of union members was contrary to the compulsory unionism prohibition in the Georgia right-to-work statute, and the state court could properly enjoin the union picketing. In reversing the Georgia Supreme Court, this Court pointed out that the allegations of the complaint, as well as the findings of the Georgia court, involved conduct of a type expressly dealt with in section 8(b) of the National Labor Relations Act, and the

determination of whether such conduct was a violation of this section was within the exclusive competence of the National Labor Relations Board. Thus, there was present in the *Curry* case conduct which, quite apart from and independent of any compulsory unionism question under the state right-to-work law, was within the scope of section 8.

Farnsworth and Chambers, supra, similarly involved a state court injunction of union picketing on the grounds that one of the purposes of the picketing was to enforce exclusive employment of union members, in violation of the Tennessee right-to-work law. The injunction was stated in the broadest possible terms, and prohibited the union from seeking in any way to persuade or induce the complainant company's employees, either at their place of employment, in their homes, or anywhere else, to cease work or otherwise interrupt their employment. The union, in seeking review of the state court action by this Court, insisted that the picketing did not involve any union security question. In its petition for writ of certiorari the union stated:

> "The contention of petitioners below was that the original bill of complaint and the amended bill of complaint showed on their faces that the subject matter of the complaint . . . set forth statutory unfair labor practices as to which the Act confers exclusive primary jurisdiction on the National Labor Relations Board. Nor was there any question raised, nor does the Record support the discussion in the opinion of the Supreme Court of Tennessee dealing with union security agreements." (P. 9.)

Thus, the union contended, and this Court, by reversing per curiam, apparently agreed that the Tennessee Court had mistakenly construed the picketing as being for the purpose of enforcement of a compulsory unionism demand. *DeVries v. Baumgartner, Construction Co.*, supra, also cited by petitioner, involved a state court injunction against picketing in a situation substantially similar to that involved in *Farnsworth and Chambers*.

Each of these cases was instituted by a complaint filed by an **employer** complaining of union conduct which, completely independent of any union security issue, was on its face the type of conduct regulated by section 8 of the National Labor Relations Act. No such conduct was involved in the present case, however.

The Schermerhorn case before the Supreme Court of Florida involved no union picketing or strike, or any other course of action that could independently be said to be an unfair labor practice under section 8. It was an action brought by **employees** contending that their jobs were threatened by a compulsory unionism **agreement** between their employer and the union.

The Florida Supreme Court dealt only with the legal question of whether the Agency Shop agreement was permissible or prohibited under the right-to-work provision of the Florida Constitution. There was nothing here for the National Labor Relations Board to decide.

What petitioner is contending, in effect, is that although a state may enact a right-to-work law, it has no power to enforce such a law. Not only that, petitioner contends, a state court may not, as the Florida Court held,

interpret the meaning of its own law as applied to a particular form of compulsory unionism agreement. This contention, it can be seen, leads only to an absurd conclusion.

In this case, the Florida Supreme Court was not interpreting or administering the National Labor Relations Act. It was merely interpreting the scope of a state constitutional provision. It would be ridiculous to contend that we have reached the point where the National Labor Relations Board is the only body with jurisdiction to interpret or construe a provision of a state constitution insofar as that provision deals in any way with labor relations matters.

In *Willard v. Huffman*, 250 N.C. 396, 109 S.E.2d 233, cert.den., 361 U.S. 893 (1959), the Supreme Court of North Carolina upheld a judgment awarding damages to an employee discharged for non-membership in a union in violation of the North Carolina right-to-work law. The Court rejected the contention of the employer that the discharge constituted an unfair labor practice under section 8(a)(3) of the National Labor Relations Act, stating:

> "Our courts, in the case before us, are not seeking to administer the provisions of section 8(a)(1) and (3) of the Labor Relations Act, Title 29, USCA; they seek only to enforce the provisions of our own Right-to-Work Act, provisions which have no counterpart in the National Labor Relations Act . . . our Right-to-Work Act has been held to be constitutional by this Court and by the Supreme Court of the United States.

Whitaker v. State of North Carolina, (335 U.S. 525)."

A petition for certiorari to review the decision of the Supreme Court of North Carolina in this case, was denied. 361 U.S. 893 (1959).

IV.

PETITIONER'S SUBSTITUTION OF A NEW NAME FOR THE AGENCY SHOP DOES NOT DISTINGUISH THE AGENCY SHOP AGREEMENT HEREIN FROM THE AGENCY SHOP AGREEMENT IN THE GENERAL MOTORS CASE. THIS SUBSTITUTION OF NAMES MERELY RAISES A FALSE AND FICTITIOUS ISSUE.

Petitioner, in its brief before this Court, for the first time, has suddenly decided that the agreement here involved is not an Agency Shop agreement, but is something which petitioner now refers to as a "service fee agreement". On this purely semantic basis, petitioner seeks to distinguish this agreement from the Agency Shop agreement involved in the *General Motors* case, in an apparent effort to avoid the inconsistency involved in arguing that the word "membership" in section 14(b) does not include such agreements.

It is interesting to note that the particular clause in the contract between petitioner and Food Fair, is headed "Agency Shop Clause" (R-13), and that the notice to employees issued jointly by the union and Food Fair (R-7) refers throughout to the establishment of an Agency

Shop and the requirement of the employees to pay Agency Shop fees. In its pleadings in the trial court, in its arguments and briefs in the District Court of Appeal, throughout the proceedings in the Florida Supreme Court, and in its petition for writ of certiorari in this Court, petitioner consistently referred to the agreement as an "Agency Shop agreement" and never once described or named it as a "service fee agreement", as it now seeks to use this term.[6]

Furthermore, in its petition filed with this Court for a writ of certiorari to review the decision of the Florida Supreme Court, petitioner referred to the agreement only as an "Agency Shop agreement". At no time prior to the filing of its present brief, did petitioner refer to a so-called "service fee shop agreement", or otherwise attempt to draw the type of distinction which it now seeks to contrive.

One of the distinctions between this case and the *General Motors* case, according to petitioner, is that "the amount of the fees in *General Motors* is strictly tied to the union dues schedule", whereas the contract here involved "fixes the amount of fees to be paid at the level of actual collective bargaining costs." (Petitioner's brief, p. 57). Similarly, petitioner states, "the purpose of the fee and the uses to which the money may be put in *General Motors* are unrestricted, and the union in *General Motors* presumably is free to use fees so received for purposes other than meeting actual costs of collective bargaining." (ibid). The Schermerhorn contract, petitioner states, "limits the purpose for which fees may be collected from non-mem-

[6]For example, see petitioner's response to application for temporary injunction (R. 11, 12), and petitioner's petition for writ of certiorari (pp. 8, 9, 11, 13, 14, 16, 18, 19, 20, 21, 22).

bers solely to defraying the union's collective bargaining costs on behalf of non-members." (ibid).

Both of these contentions are clearly refuted by the facts in the Record. In the first place, the amount of the fees in both *General Motors* and the present case are strictly tied to the union dues schedule. The "Important Notice to Employees" (R. 7) issued jointly by petitioner and Food Fair, following the formal signing of the Agency Shop agreement, states:

> ". . . you are obligated, under the provisions of the Agency Shop, to pay an initial service fee which is the **equal** of the initiation fee for union members, and a monthly service fee which is the **equal** of the monthly dues for those who voluntarily become union members.". (R. 7). (Emphasis added).[7]

While the Schermerhorn Agency Shop Clause itself provides that the amount of the Agency Shop fees "shall in no case exceed the initiation fee and the membership dues paid by those who voluntarily choose to join the union", there is no provision for setting the fees at any lower level, and the notice to employees stating that the amount of the fees shall be *equal* to the union initiation fees and dues, clearly shows what the parties intended in this respect.

Petitioner's contention that the Schermerhorn con-

[7] In the *General Motors* formula the union demand was for payment by the non-union member of a sum *equal* to the initiation fee charged members at each of the union's locals, and monthly sums *equal* to the regular membership dues required of the union's or its locals' members at each location.

tract limits the purposes for which fees may be collected, is, again, a purely fictionalized version of the situation. There is no actual restraint imposed upon what the union does with the money once it receives it. The union suggests that an employee could, by way of a grievance procedure, challenge the use of the money for purposes other than collective bargaining, but the practicality of such a challenge is quite another matter. Quite conceivably, the union could earmark all of the money collected from non-union employees for defraying the costs of collective bargaining, and allocate all of the money received from union members for non-collective bargaining activities.[8] There are many other bookkeeping devices which could be used to maintain the fiction that the so-called service fees are allocated only to costs of collective bargaining. In any event, it is difficult to see how the union's accounting methods and procedures would be subject to any real degree of control. The union, after years of collecting dues, doesn't even know what its collective bargaining costs are. (See Footnote 27, petitioner's brief, p. 32.) Thus, for all practical purposes, there is no limit imposed on the purpose and use of the exacted dues and fees under this agreement.[9]

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[8]The AFL-CIO Committee on Political Education follows this method of regulating monies spent for "education" and those used for direct political contribution. See Annual Reports filed pursuant to the Federal Corrupt Practices Act with the Clerk of the House of Representatives.

[9]It is evident from the Annual Report filed by the Retail Clerks International Association with the United States Department of Labor, Bureau of Labor Management Reports and signed by the President of the International on July 16, 1962, that the dues, fees and moneys collected by the Retail Clerks International are used for a broad range of purposes not related to collective bargaining. The Report shows that for the reporting period commencing May 1, 1961, and ending April 30, 1962, the total assets were $5,409,831. and that the total liabilities

The brief filed for the AFL-CIO and the United Auto Workers as Amici Curiae, similarly seeks to distinguish the agreement involved in this case from the Agency Shop agreement involved in *General Motors*. This brief states:

> "Nevertheless, we recognize that the "agency shop" formula presented in the *General Motors* case remains arguably subject to state prohibition on the theory that it does *in fact* require membership . . . since the periodic payments are but an equivalent substitute for union dues and are used for union benefits denied to non-members, the payment for unobtained benefits encourages membership and is tantamount to the compulsion of membership." (pp. 36, 37).

It thus appears that the AFL-CIO and the United Auto Workers concede that Agency Shop contracts are subject to state regulation under section 14(b), but in order to avoid that result in this case, they have invented a new name for this agreement, which they now call "the service fee shop" instead of an Agency Shop, as they had been calling it all the time up to now. They thus hope, merely by substituting a new name, to cloud the issues and mislead the Court.

To permit the petitioner to change its position in this manner, after having convinced this Court to accept jurisdiction on the issue of an Agency Shop, makes a mockery

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were $221,276. with the Retail Clerks International thus having net assets of $5,188,555. The Report shows very large sums of money spent by this union for contributions and gifts, educational and publicity expenses, television shows, benefits and charities. The President of the union signing the Financial Report received a gross salary and allowances of $58,294.52.

of the processes of this Court. Respondents remind the Court that the question presented in petitioner's petition for writ of certiorari to the Florida Supreme Court, set forth on page 2 thereof, was as follows:

"QUESTION PRESENTED"

"WHETHER THE FLORIDA SUPREME COURT MISCONSTRUED SECTION 14(b) OF THE TAFT-HARTLEY ACT IN HOLDING THAT IT AUTHORIZES THE STATES BOTH TO PROHIBIT AND TO REGULATE AN 'AGENCY SHOP' CLAUSE IN AN INTERSTATE LABOR CONTRACT, WHICH CLAUSE DOES NOT REQUIRE 'MEMBERSHIP' IN A LABOR UNION, BUT WHICH DOES REQUIRE NON-MEMBER EMPLOYEES TO PAY A COLLECTIVE BARGAINING SERVICE FEE TO A LABOR UNION."

If unions are able to thus change the names of compulsory exaction devices at will, or in the middle of the legal stream, there is no limit to the fanciful names that can be coined.[10] As another example, the United Auto Workers Union has set up compulsory exaction devices

[10]The Agency Shop device obligating employees who don't join the union to pay the equivalent of dues for the union services was the subject of an unofficial report prepared by one Glenn C. Fleshman, Commissioner of the Federal Mediation and Conciliation Service on April 20, 1959, such report being referred to at page 12 of the brief of the AFL-CIO as a report of the Federal Mediation and Conciliation Service. The author illustrated that the Agency Shop clause has been referred to under many names, including "Dues and Services for Deduction", "Dues or Charity", "Service Clause", "Charity and Services Clause", "Welfare Fund and Conscientious Objections", "Service Charge", "Work Permits", "Equivalent of Dues", "Equal to Dues", "Service Costs", and "Union Shop or Equal to Dues and Assessments".

under the name of "Flower Funds", which presumably are for the purpose of buying flowers for deceased brethren, but in practice are private slush funds for Union officials to use for political contributions and other purposes. See Hearings, Senate Committee on Improper Activities in the Labor Management Field, 1959—Part 58, pp. 20118-20127; 20294, 20295. To paraphrase the Immortal Bard, "A Flower Fund by any other name smells just as odorous."

Having conceded that Agency Shop agreements are probably subject to state regulation under section 14(b), petitioner and its parent AFL-CIO now propose that "a true service fee" for services actually rendered to an employee by a union "is not even a form of union security as commonly understood", and is thus completely outside the scope and contemplation of section 8(a)(3) as well as section 14(b). (Petitioner's brief p. 58; AFL-CIO, UAW brief, pp. 37, 41). It is a non-discriminatory arrangement, petitioner contends, for the purpose of prorating costs, and is not subject to section 8 at all.

This contention completely ignores the fact that such an arrangement, whatever economic arguments can be advanced for it, still conditions an employee's employment upon support of a labor union. If he doesn't pay the money to the union he will lose his job. It is thus a form of compulsory unionism. The petitioner's contention also overlooks the fact that section 7 of the National Labor Relations Act guarantees the right of employees not only to join, form and assist labor organizations, but also to refrain from joining, forming or assisting labor organizations. It must certainly be admitted that the discharge of an employee for failure to pay money for the purpose

of assisting a labor union to defray its costs, whatever these costs might be, would deny him this fundamental right protected by section 7, to refrain from assisting a labor union. The Record shows that the plaintiff-respondents do not want "to pay the defendant union any dues or service fees or initiation fees" (R. 5), and to compel them to pay any such moneys to the union as the price of keeping their jobs would be a form of compulsory support of a labor organization, regardless of the effort to disguise the payment as a so-called service fee. As petitioner so aptly expresses it in its brief in support of petition for a writ of certiorari, "In labor relations, as in all other aspects of political life, the power of the purse strings is the power to control". (Petition for writ of certiorari, p. 21). Thus, the union by seeking the power to exact a service fee is seeking the power to control the worker's job by conditioning his employment on payment of a compulsory fee. If this is not compulsory unionism, what is it?

The Solicitor General in his brief in *General Motors* (p. 12) similarly suggests that "a service fee to defray the costs of a hiring hall, of processing grievances, or of performing other functions directly beneficial to all employees in the bargaining unit—might well be outside the area of 'union security' altogether . . . quite independently of the proviso to section 8(a)(3)." This suggestion is directly contradictory to the argument made on page 8 of the same brief, wherein it is stated:

> "The proviso's reference to 'an agreement with a labor organization . . . to require as a condition of employment membership therein' covers not merely agreements requiring membership of all employees in *haec verba*, but all contracts calling

for any lesser kind of compulsory association with, **or support for a labor organization** which, but for the proviso, would violate the policy of the Act." (Emphasis added).

Thus, on the one hand it is urged that the term "membership" embraces "**all** contracts calling for support of a labor organization", and on the other, it is suggested that the same term—"membership"—does not embrace **some** contracts calling for support of a labor organization." The contradiction within and inconsistency of such a position is much too glaring to require any further comment.

It must be emphasized that in enacting section 14(b) Congress did not distinguish between full payment of union dues, partial payment of union dues, payment of service fees, or any other type of compulsory payment; it repeatedly and consistently referred to "all forms of compulsory unionism". Section 14(b) is a clear expression of Congressional intent that the Act is not to be interpreted in such a way as to circumvent state laws prohibiting or regulating compulsory unionism.

An even more significant point, which seems to have been overlooked by petitioner as well as by the AFL-CIO and the Solicitor General, is that if, as they contend, service fee payments "might well be outside the area of 'union security' altogether" and thus beyond the scope of section 8 of the Act, there is no ground for applying the doctrine of federal preemption at all. Any arrangement or course of conduct which is unregulated by federal law is left for regulation by the states. This principle was recognized and reiterated in *Garmon*, as well as in

International Association of Machinists v. Gonzales, 356 U.S. 617 (1957); *U.A.W. v. Russell*, 356 U.S. 634 (1957); *Construction Workers v. Laburnum*, 347 U.S. 656 (1954), and *United Auto Workers v. Wisconsin*, 351 U.S. 266 (1955).

The complete inconsistency of petitioner's position in this respect can be seen from the fact that in one section of its brief (p. 19), it insists that the contract here in question is "arguably" subject to regulation under section 8(a)(3) and, accordingly, "respondents could have filed section 8(a)(3) unfair labor practice charges against petitioners with the National Labor Relations Board", and in another section of its brief (p. 58), it argues that the Schermerhorn contract is "completely outside the scope and contemplation of section 8(a)(3)". If this latter contention is correct, it is obvious that the agreement is not "arguably" subject to regulation under section 8(a)(3), and since, for reasons heretofore shown, it is not "protected" under section 7, it must then be regarded as entirely beyond the regulatory scheme of the National Act, and left for regulation by the states.

Another section of the Taft-Hartley Act, section 302(c)(4), imposes a further obstacle to petitioner's contention that service fees are beyond the scope of the Act, and may be exacted from employees as a condition of employment. Under this section, an employer may not deduct from the wages of employees and pay over to a union any money other than "money deducted from the wages of employees in payment of membership dues in a labor organization". (Emphasis added). The check-off of any moneys other than amounts representing membership dues, it has been held, is prohibited by this section.

Carroll v. American Federation of Musicians, 295 F.2d 484 CA 3 (1961); *International Union, Mine, Mill and Smelter Workers v. American Zinc, Lead and Smelting Co.*, decided Jan. 2, 1963, U. S. Court of Appeals for the Ninth Circuit. In the *Carroll* case, the Court of Appeals held that only assessments which are "incidents of membership" are permitted to be paid under section 302(c)(4). Similarly, the Department of Justice, the agency charged with enforcement of section 302, has held that certain assessments imposed under a United Mine Workers agreement were "incidents of membership", and could lawfully be deducted. See *NLRB v. Food Fair Stores*, 307 F.2d 3, CA 3 (1962).

It can hardly be argued that service fees collected from non-members of a union are "incidents of membership" for the purposes of this section.

It should also be noted that the National Labor Relations Board has held that various forms of assessments voted by a union are not within the term "periodic dues" as used in section 8(a)(3), and that an employee employed under a union shop contract may not be discharged for refusal to pay such assessments. See *International Harvester Co.*, 95 NLRB 730; *Continental Can Co.*, 98 NLRB 1252; *Anaconda Copper Co.*, 110 NLRB 1925. The Board has also held that a union which charges fees for services rendered non-members thereby prejudices its status as the bargaining agent. *Hughes Tool Co.*, 104 NLRB 318. In that case, the Board indicated it would revoke the certification of a union if it did not abandon its claimed right to charge a service fee of $15 for handling grievances of non-union members, and other service fees of varying amounts. Thus petitioner herein, in asserting its claim

to "service fees" may not be aware of this threat to its right to continue as bargaining agent.

V.

PETITIONER'S PLEA THAT NON-UNION WORKERS SHOULD BE COMPELLED TO FINANCIALLY SUPPORT THE UNION OVERLOOKS AND IGNORES THE INDIVIDUAL'S FUNDAMENTAL RIGHT TO WORK. THE RIGHT TO WORK SHOULD NOT DEPEND ON ONE'S CRAFT, RACE, COLOR, LODGE, CHURCH OR OTHER ORGANIZATIONS TO WHICH HE BELONGS.

The right to work is one of the most precious liberties that man possesses. Man has as much right to work without compulsion as he has to live, to be free, to own property, to speak his mind, or to join a church of his own choice, for without freedom to work, the other freedoms would soon disappear.

Petitioner, in contending that it should suffer no loss for "having conferred a direct benefit" on the respondents, has overlooked and ignored fundamental right-to-work liberty and is trying to take unto itself, the compulsory taxing powers of sovereign government. The power to tax, however, is reserved to the government and has not been delegated to the union.[11] Petitioner, as well,

[11]Interestingly enough, the petitioner and other labor organizations receiving direct benefits from the federal and state governments are exempt from the payment of income taxes (I. R. C. (1954), Sec. 501(c)(5); I. R. C. (1959) Sec. 101( ) and Florida real property taxes (Florida Statutes (1961) Sec. 192.06 (10). The respondents, not being tax exempt labor organizations, pay income tax and Florida property tax.

ignores the fundamental objective of the National Labor Relations Act which Act was passed for the primary benefit of the individual and not for the financial benefit of the unions.

The union's plea that fairness requires financial support of the union by non-union employees under a service fee arrangement, should be addressed to Congress or to the state legislatures, rather than to this Court. As stated by Justice Frankfurter in *A. F. of L. v. American Sash Co.*, 335 U.S. 538, 553 (1949):

> "If the proponents of union security agreements have confidence in the arguments addressed to the Court in their 'economic brief' they should address those arguments to the electorate. Its endorsement would be a vindication that the mandate of this Court could never give."

The American Sash Co., case, together with the companion cases, *Lincoln Federal Union v. Northwestern Iron and Metal Co.*, 335 U.S. 525, and *Whitaker v. North Carolina*, 335 U.S. 531, decided at the same time, held that no violation of the due process clause is involved in state prohibition of compulsory unionism. In spite of this clear holding, petitioner in its brief, (p. 35) contends that the "union's required expenditures for non-members, if not recoverable through a reasonable service fee, might raise a question of deprivation of property without due process". Petitioner is thus attempting to interject into this case an issue not raised in the court below, and one which has already been authoritatively answered and rejected by this Court.

More fundamental than the claim of this wealthy, tax-exempt union for a broader distribution of collective bargaining costs is the inherent right of the respondents, and all persons, to work for a living without fear of coercion. The right to work is an individual liberty of the highest order, and one that should not be subordinated to the economic claims of any organization, whether it be a labor union, lodge, church, political party or any other group.

"It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the . . . Constitution . . . to secure." *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948).

The right to work principle has been most eloquently expressed by the venerable Mr. Justice Terrell of the Florida Supreme Court in *Carpenters Dist. Council v. Miami Chapter, Associated General Contractors*, 55 So.2d 794, 796 (1952) as follows:

> "The right to work is equivalent to the right to eat and the right to eat and provide raiment for his dependents is man's most dominant urge. In a free country like ours such a right should not depend on one's race, color, the lodge, craft, church or other organizations to which he belongs. Such a requirement is contrary to the spirit of our institutions, the basis on which our democracy was founded and every impulse of the forefathers who gave it existence. I can think of nothing more out of harmony with true Americanism. Membership in one's lodge, craft or

church may be a means of enlarging spiritual, cultural and physical assets, but to make his bread depend on craft, or church membership would be the worst species of anti-americanism."

CONCLUSION

For the foregoing reasons, the decision of the Supreme Court of Florida should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL 1625, ET AL., *Petitioners*,

v.

ALBERTA SCHERMERHORN, ET AL., *Respondents*.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF OF THE STATE OF FLORIDA, AS AMICUS CURIAE, JOINED AND SUPPORTED BY THE STATES OF ALABAMA, ARIZONA, IOWA, KANSAS, MISSISSIPPI, NEBRASKA, NORTH CAROLINA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, AND UTAH

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OPINION BELOW

The opinion of the Supreme Court of Florida here on review is officially reported at 141 So. 2d 269 (1962).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section 12 of the Declaration of Rights of the Florida Constitution (§12, 25 Fla. Stat. Ann.) provides as follows:

"The right of persons to work shall not be denied or abridged on account of membership or non-

membership in any labor union, or labor organization; provided, that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer."

Section 14(b) of the National Labor Relations Act (61 Stat. 151, 29 U.S.C. §164) provides as follows:

"Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

QUESTION PRESENTED

The question presented is whether Congress, in enacting the Taft-Hartley Act, intended to deprive the states of authority to prohibit the execution and application of agency shop contracts.

STATEMENT OF THE CASE

Appellant, a labor union representing employees of Food Fair Stores, Inc. in five Florida counties, entered into a collective bargaining contract with Food Fair containing a so-called agency shop clause which requires non-union employees, under pain of discharge, to pay to the union a sum of money equivalent to the union initiation fee, and, in addition, monthly payments equal to the regular union dues. A group of non-union employees of Food Fair Stores sought an injunction against the enforcement of this agency shop clause on the ground that it violates Article 12 of the Declaration of Rights of the Florida Constitution, popularly known as the "Right-to-Work Law." The Supreme Court of Florida held that the ageny shop clause "is

palpably and totally inconsistent with the freedom of choise contemplated by our Declaration of Rights."

The Supreme Court of Florida also considered and rejected appellant union's contention that the Florida courts are without jurisdiction in this matter because the Federal Government has, in the National Labor Relations Act, pre-empted the field. The court noted that section 14(b) of the Taft-Hartley Act preserves the jurisdiction of the states in matters involving state "Right-to-Work" provisions and concluded that:

> "It is not to be presumed that Congress would preserve to the states the field of right-to-work legislation, while, at the same time, intending that unions and management could, by the use of subterfuge of an agency shop clause, circumvent and, in effect, nullify a paramount provision of the organic law of any of the several states."

It is this holding of the Supreme Court of Florida on the federal pre-emption question which is now challenged by appellant herein.

SUMMARY OF ARGUMENT

Appellant's case rests upon the contention that section 14(b) of the Taft-Hartley Act permits the states to outlaw only agreements requiring "membership" in a labor union, and that since agency shop agreements do not require "membership" they are not within the scope of section 14(b) and remain subject to exclusive federal jurisdiction.

Such an interpretation of section 14(b) is not consistent with the legislative purposes of the National Labor Relations Act nor is it supported by the legislative history of that Act.

In the Taft-Hartley Act there is no evidence that Congress intended to pre-empt the right of states to regulate or prohibit the agency shop type of arrangement, and, in fact, the evidence is all to the contrary. The history of the National Labor Relations Act, and its amendment by the Taft-Hartley Act, is replete with evidence that Congress intended to leave the entire field of union security agreements for regulation by the states. Section 14(b) was expressly written into the Taft-Hartley Act to manifest this intention. An interpretation of section 14(b) which would exclude agency shop agreements from its intended scope would for all practical purposes render this section meaningless.

There is no conflict in the scheme of federal regulation embodied in the National Labor Relations Act and the enforcement of state laws restricting agency shop agreements, nor does enforcement of such laws impinge upon the regulatory functions of the National Labor Relations Board. There is thus no basis for concluding that the exclusive jurisdiction rule must be applied in order to avoid conflict between the federal law and such state laws.

ARGUMENT

I.

The Effectuation of the Legislative Purpose of the National Labor Relations Act Does Not Require Exclusive Federal Regulation of Agency Shop Agreements

The National Labor Relations Act as originally enacted dealt only with certain proscribed unfair labor practices by employers. It imposed no restrictions or sanctions upon the activities or conduct of labor organizations. For that reason, during the Wagner Act period the states remained free to regulate broad areas

of union conduct even though such regulation affected interstate commerce. The Federal Government had not "entered the field" and there was, therefore, no ground for the assertion of a federal pre-emption argument.[1]

It was similarly held that the Wagner Act did not undertake to regulate or protect compulsory membership agreements even though such agreements were affirmatively permitted under section 8(3) of that Act. In *Algoma Plywood and Veneer Co.* v. *Wisconsin Board*, 336 U.S. 301 (1949), the question presented was whether an order of the state board directing an employer to cease and desist from giving effect to a maintenance of membership agreement was in conflict with the federal law. The argument was made that a state cannot forbid what the federal law affirmatively permits, but in disposing of this contention the court stated:

> "The short answer is that section 8(3) merely disclaims a national policy hostile to the closed shop or other forms of union security agreement. This is the obvious inference to be drawn from the choice of words 'nothing in this act * * * or in any other statute of the United States,' and it is confirmed by the legislative history."

After thoroughly reviewing the legislative history of the Wagner Act the court concluded that there was no intent by Congress to displace state authority with respect to regulation of union security agreements of any type.

Thus, as the law stood in 1947 when Congress undertook to revise the Wagner Act the states had power

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[1] *Allen Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U.S. 740 (1942).

to restrict or forbid compulsory unionism agreements of all types, including the agency shop.

In the Taft-Hartley Act Congress for the first time undertook to regulate the activities of labor unions. It amended section 8 of the National Labor Relations Act so as to add to the existing list of employer unfair labor practices a new list of union unfair labor practices. In addition, because of the abuses which had grown up in connection with the closed shop, Congress determined that as a matter of National policy the closed shop should be outlawed. In order to accomplish this it simply retained the language of the original proviso to section 8(3) that:

> "Nothing in this Act, or in any other statute of the United States shall preclude an employer from making an agreement with a labor organization * * * to require as a condition of employment membership therein."

but added the following at the end of the above sentence:

> ". . . on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later * * * PROVIDED FURTHER, that no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

In order to dispel any possible inference that these amendments constituted an enlargement of Congress' regulatory power as respects other forms of union security agreements the further provision was added as section 14(b) proclaiming that:

> "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any state or territory in which such execution or application is prohibited by state or territorial law."

As will be hereinafter seen, the legislative history conclusively shows that this section was intended to make clear that the states would continue to have authority to regulate or restrict all forms of compulsory unionism agreements.

But even apart from this clear expression in section 14(b) there is nowhere in the legislative history the slightest evidence of a contrary legislative purpose, so that even if section 14(b) had not been inserted it could not logically be contended that the changes in section 8(a)(3), beyond outlawing the closed shop, extended the mantle of federal protection to other types of union security agreements. Such other forms remained, at most, permissive, because the amended section 8(a)(3), like the previous section 8(3), in the words of *Algoma,* merely disclaims a national policy hostile to the union shop or other forms of union security agreement. 336 U.S. 301, at p. 307.

This point is further reinforced by the comment in the *Algoma* opinion that:

> "... if there could be any doubt that the language of the section means that the Act shall not be

> construed to authorize any 'application' of a *union security contract*, such as discharging an employee, which under the circumstances 'is prohibited' by the State, the legislative history of the section would dispel it." [Emphasis added.]

Within the regulatory scheme thus established there is no inconsistency between federal and state jurisdiction over agency shop agreements. If the agency shop is a permitted form of union security under section 8(a)(3) it is permitted only if also permitted by state law. If the agency shop is not permitted under section 8(a)(3) it is beyond the scope of regulation by the states.

II.

The Legislative History of the Taft-Hartley Act Conclusively Shows That Congress Intended to Leave Regulation of This Form of Union Security to the States

In 1944, three years prior to the enactment of the Taft-Hartley Act, the voters of Florida adopted the Right-to-Work amendment to the Florida Constitution here involved. In that same year the state of Arkansas adopted a constitutional amendment prohibiting not only agreements requiring membership in a labor organization, but any requirement under which any employee would be "compelled to pay dues to any labor organization as a prerequisite to or condition of employment." (Constitutional Amendment No. 34, adopted Nov. 7, 1944). The state of Virginia followed suit on January 12, 1947 by adopting a statute stating in explicit language:

> "No employer shall require any person, as a condition of employment or continuation of employment *to pay any dues, fees or other charges of any kind* to any labor union or labor organization." Sec. 40-72 Virginia Code.

The state of Tennessee, on February 21, 1947, adopted the following statutory provision:

> "Section 50-210.—It shall be unlawful for any person, firm, corporation or association of any kind to exclude from employment any person by reason of such person's payment of or failure *to pay dues, fees, assessments, or other charges* to any labor union or employee organization of any kind."

On March 18, 1947 the state of North Carolina adopted a statute reading as follows:

> "Section 95-82.—No employer shall require any person, as a condition of employment or continuation of employment, *to pay any dues, fees or other charges of any kind* to any labor union or labor organization."

On March 27, 1947 a law was passed by the Georgia Legislature specifically outlawing any requirement for payment of union dues in the following language:

> "Section 54-903.—No individual shall be required as a condition of employment, or of continuance of employment, *to pay any fee, assessment, or other sum of money whatsoever* to a labor organization."

The state of Iowa on April 28, 1947 adopted a statute embodying the following language:

> "Section 736A.4.—It shall be unlawful for any person, firm, association, labor organization or corporation, or political subdivision, either directly or indirectly, or in any manner or by any means as a prerequisite to or a condition of employment to require any person *to pay dues, charges, fees, contributions, fines, or assessments* to any labor union, labor association or labor organization."

Right-to-work laws adopted by Arizona (Nov. 1946), Nebraska (Nov. 1946), South Dakota (Nov. 1946) and Texas (Apr. 1947) were similar to the Florida law in that they prohibited compulsory membership without further mention of payment of dues, fees or other charges.

Thus, at the time Congress enacted the Taft-Hartley Act on June 23, 1947, eleven states had adopted laws prohibiting compulsory unionism, and six of these expressly prohibited not only compulsory membership but also any requirement for payment of dues, fees or other charges. There is ample evidence in the legislative history of the Taft-Hartley Act that Congress was aware of these state laws and intended the language of section 14(b) to fully cover them.[2] Senator Taft, sponsor of the legislation in the Senate, and a member of the Senate House Conference which approved the final version, explained the purpose of section 14(b) as follows:

> "Many states have enacted laws or adopted constitutional provisions to make *all forms* of compulsory unionism in such states illegal. As stated in the report accompanying the Senate Committee bill, it was not the intent to deprive the states of that power * * *." Congressional Record, Senate, June 6, 1947, pg. 6675 [Emphasis added.]

The report of the managers on the part of the House stated with reference to section 13 of the House bill (H.R. 3020) and section 14 of the Conference Committee amendments:

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[2] An enumeration of state laws forbidding compulsory unionism, including those which banned payment of dues and fees, was set forth in House Report No. 245, the report on the House bill H.R. 3020.

"Under the House bill there was included a new section 13 of the National Labor Relations Act to assure that nothing in the Act was to be construed as authorizing any closed shop, union shop, maintenance of membership, *or other form of compulsory unionism agreement* in any State where the execution of such agreement would be contrary to State law. Many States have enacted laws or adopted constitutional provisions *to make all forms of compulsory unionism* in those States illegal. It was never the intention of the National Labor Relations Act, as is disclosed by the legislative history of that Act, to preempt the field in this regard so as to deprive the States of their powers to prevent compulsory unionism. * * * To make certain that there should be no question about this, section 13 was included in the House bill. The conference agreement, in section 14(b), contains a provision having the same effect." (93 Cong. Rec. June 4, 1947, pg. 6378) [Emphasis added.]

Other references in Committee reports show that Congress intended section 14(b) as validating all forms of anti-compulsion statutes enacted by the States. House Report No. 245, 80th Cong., p. 34, states that by this section:

"The United States expressly declares the subject of compulsory unionism one that the States may regulate concurrently with the United States, notwithstanding that the agreements affect commerce, and notwithstanding that the State laws *limit compulsory unionism more drastically than does Federal law.*"

House Conference Report No. 510, 80th Cong., stated:

"Under the House bill there was included a new section [14(b)] of the National Labor Relations Act to assure nothing in the Act was to be con-

strued as authorizing any closed shop, union shop, maintenance of membership, *or other form of compulsory unionism agreement* in any State where the execution of such agreements would be contrary to State law."

The consistent use of the phrase "*or other form of compulsory unionism*" throughout these reports reveals an intent to deal with the complete range of union agreements which impose compulsion on employees, and that Congress was not restricting itself to "membership" requirements. The above-quoted House Conference Report No. 510, it will be noted, lists the three forms of compulsory membership agreements, namely the closed shop, the union shop, and maintenance of membership, and then goes on to refer to "*or other form of compulsory unionism agreement.*" In view of this broad language there can be no room for doubt that Congress intended no interference with state laws prohibiting compulsory payment of dues and fees to a union. Since the agency shop is a form of compulsory unionism it must necessarily be included within the range of compulsory unionism agreements which Congress intended to reserve for state regulation.

III.

An Interpretation of Section 14(b) Which Would Exclude Agency Shop Agreements From Its Intended Scope Would For All Practical Purposes Render the Section Meaningless

While section 8(a)(3) of the NLRA authorizes employers and unions to enter into agreements requiring "membership" in the union as a condition of employment, this authorization is followed immediately by the proviso that an employer may not discharge an employee for any reason "*other than the failure of the employee to tender periodic dues and the initiation fees*

uniformly required as a condition of acquiring or retaining membership." As a result of this proviso a contract requiring membership cannot be literally enforced, that is to say, the employee who refuses to become a member of the union cannot be discharged for nonmembership. As long as he tenders to the union the amount of money representing the dues and initiation fee he can disregard the membership requirement of the union agreement. Thus in practical effect this section authorizes the employer and the union to agree on a compulsory membership requirement but not to enforce it in literal terms.

In *Radio Officers Union* v. *NLRB*, 347 U.S. 17 (1954) this Court analyzed the meaning of the word membership as used in section 8(a)(3), and concluded that this section was designed:

> "to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, *or abstain from joining any union* without imperiling their livelihood." [Emphasis added.] P. 40

The legislative history of the Act, the court added, clearly indicates:

> "that Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees."

Numerous cases under this section have held that employees who have clearly expressed objections to belonging to a union, or who have dropped their union membership, cannot be discharged so long as they tender the prescribed dues and fees. *Union Starch and Refining Co.* v. *NLRB*, 186 F.2d 1008, CA 7 (1951); *NLRB* v. *Gottfried Baking Co.*, 210 F.2d 772, CA 2 (1954);

NLRB v. *Pape Broadcasting Co.*, 217 F.2d 197, CA 5 (1954); *NLRB* v. *International Assn. of Machinists*, 203 F.2d 173, CA 9 (1953). In the latter case the employee in question not only voiced strong objections to membership in the union but even started a campaign to oust the union as bargaining agent and to form a new union. Because of these activities the union refused to accept his tender of dues and caused his discharge. Such discharge was held improper by the NLRB, and its finding was affirmed by the Court of Appeals. Diligent research fails to reveal any case in which a lack of willingness to become or remain a union member was found a proper basis for discharge of an employee who had complied with the requirement for tendering dues and fees.

It is evident then that in practical application section 8(a)(3) itself prohibits enforcement of compulsory membership as a condition of employment, permitting only a requirement for payment of the prescribed amounts of money. In light of this it can be seen that if section 14(b) is construed with literal exactitude as leaving to the states only the authority to prohibit compulsory membership it would, in effect, leave *nothing* to the states because compulsory membership as a condition of employment is already prohibited by section 8(a)(3). Section 14(b), as well as the Congressional purpose in adopting this section, has meaning only if it leaves to the states the power to prohibit the same type of agreement that is permitted under section 8(a)(3) namely, agreements requiring payment of dues and fees. If it doesn't do this it does absolutely nothing, and its inclusion in the Taft-Hartley Act was meaningless. This point was incisively stated by the court in *Amalgamated Assn.* v. *Las Vegas-Reno-*

Tonopah Stage Lines, 202 F.Supp. 726, DC Nev. (1962) in ruling upon the validity of an agency shop agreement under the Nevada right to work law, as follows:

> "Although it is true that Section 14(b) literally only gives the states the right to outlaw agreements which make 'membership' in a union compulsory, we are convinced that we would be frustrating the clear congressional purpose and creating an utterly absurd result if we were to hold that literalness should be exalted to a point where the states were denied the right to ban the agency shop as well. Section 14(b) would be bereft of meaning if we were to construe it in a fashion which would render the states powerless to make illegal that type of union security agreement which imposes liabilities on the workingman which, realistically, are the same liabilities which, under the section, the states may remove."

A similar conclusion was reached by the Supreme Court of Kansas in holding that the Kansas law under which agency shop contracts were outlawed was clearly protected by section 14(b). *Higgins* v. *Cardinal Manufacturing Co.*, 188 Kan. 11 (1961), 360 P.2d 456, cert. den. 368 U.S. 829 (1962). See also, *Sheet Metal Workers International Assn.* v. *Nichols*, 89 Ariz. 187, 316 P.2d 204 (1961), and *Meade Electric Co.* v. *Hagberg*, 129 Ind. App. 631, 159 NE 2d 408 (1959), in which the question of state authority to regulate agency shop clauses was similarly raised.

IV.

State Authority to Restrict Agency Shop Agreements Is Unaffected by the Pre-Emption Rule Stated in the Garmon Case

The decision of this Court in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959) reiterating the broad scope of the federal pre-emption rule is cited by appellant herein to support its contention that states may not regulate or restrict agency shop agreements. That decision reversed a California state court judgment awarding damages to a lumber dealer for losses sustained as a result of picketing by unions seeking recognition as bargaining agents. The employer had originally filed an unfair labor practice charge with the National Labor Relations Board asserting that the picketing violated the NLRA, but the Board declined to exercise jurisdiction. In proceedings brought in the state court the court concluded that the union activities constituted a tort based on an unfair labor practice under state law and awarded damages accordingly. This Court, in setting aside the judgment, held that the failure of the NLRB to assume jurisdiction did not leave the State free to regulate conduct it would otherwise be prevented from regulating, and stated:

> "When it is clear or may fairly be assumed that the activities which a state purports to regulate are protected by section 7 of the National Labor Relations Act, or constitute an unfair labor practice under section 8, due regard for the federal enactment requires that State jurisdiction must yield. * * * The case before us is such a case. The adjudication in California has throughout been based on the assumption that the behavior of the petitioning unions constituted an unfair labor practice. This conclusion was derived by the California

courts from the facts as well as from their view of the Act. It is not for us to decide whether the National Labor Relations Board would have, or should have decided these questions in the same manner. When an activity is arguably subject to section 7 or section 8 of the Act, the States as well as the federal courts must yield to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." pp. 244, 245

It will be immediately noted that this case involved picketing of a type which is expressly dealt with under section 8 of the NLRA, and the regulation of which Congress has entrusted to the National Labor Relations Board.

The other pre-emption cases cited in *Garmon* similarly involved state regulation of a particular course of conduct expressly dealt with in section 8. *Garner* v. *Teamsters Union*, 346 U.S. 485 (1953) involved picketing activity which was held clearly a violation of section 8(b) of the NLRA; *Weber* v. *Anheuser Busch*, 348 U.S. 468 (1955) involved a strike and picketing to enforce a jurisdictional dispute claim of the striking union, conduct clearly regulated under section 8(b); *Guss* v. *Utah Board*, 352 U.S. 1. (1957) involved an employer refusal to bargain with a union certified as employee bargaining agent by the NLRB; *International Union* v. *O'Brien*, 339 U.S. 454 (1950) involved a strike clearly recognized as regulated by section 8(b)(4) and section 8(d) of the NLRA; *Youngdahl* v. *Rainfair*, 355 U.S. 131 (1957) involved striking and picketing of a type unequivocally regulated by section 8, as did also *Amalgamated Assn.* v. *Wisconsin Board*, 340 U.S. 383 (1950).

In the instant case, however, the Florida courts were not dealing with any particular conduct or activity of this type. There was no strike or picketing by employees, nor any charged unfair labor practice on the part of the employer. Thus there was no independent conduct which could be said to be prohibited by the NLRA. Nor did the state court action affect any activities which the NLRA sought to protect. As previously indicated the authorization for union security agreements in section 8(a)(3) was a "permissive" rather than a "protective" proviso, adopted for the purpose of "disclaiming a national policy hostile to * * * union security agreements," as stated in *Algoma*.

For this reason also, the present case is not at all comparable to *Construction and General Laborers Union* v. *Curry*, 371 U.S. 542, (1963), which involved an injunction issued by a state court in Georgia to restrain peaceful picketing by a union for the purpose of enforcing payment of prevailing wages and the hiring of union labor. The Georgia court found that one of the purposes of the picketing was to force the employer to agree to hire only union members and was thus violative of the Georgia right to work laws' prohibition of compulsory union membership agreements. In reversing the decision of the Georgia court this Court held that "the allegations of the complaint, as well as the findings of the Georgia Supreme Court, made out at least an arguable violation of section 8(b) of the National Labor Relations Act," and consequently it was within the exclusive jurisdiction of the NLRB to adjudicate. The fact that the conduct in question also involved a violation of the Georgia right to work law, the court held, did not give the state court jurisdiction.

IBEW Local 429 v. *Farnsworth and Chambers Co.*, 353 U.S. 969 (1957); *De Vries* v. *Baumgartner Electric Co.*, 359 U.S. 498 (1959) and *Plankinton Packing Co.* v. *Wisconsin Board*, 338 U.S. 953 (1950), similarly involved conduct which, independent of the union security issue, could be regarded as unlawful under section 8 of the NLRA. The *Farnsworth* case and the *De Vries* case each involved picketing in circumstances almost identical to that present in *Construction and General Laborers Union* v. *Curry, supra.* In the *Plankinton* case the Wisconsin Employment Relations Board expressly found that both the employer and the union had engaged in unfair labor practices under sections 8(a) and 8(b) of the NLRA for the purpose of compelling an employee to acquire union membership, and that such conduct violated the provisions of the Wisconsin Employment Peace Act which prohibited compulsory union membership agreements without a two thirds vote of affected employees. A cease and desist order issued by the Wisconsin Board was set aside by this Court on the ground that the conduct in question was clearly regulated by the NLRA and thus removed from state jurisdiction.

The assertion has frequently been made that the decision in *Plankinton*, in effect, overruled the prior decision in *Algoma Plywood and Veneer Co.* v. *Wisconsin Board, supra*, which upheld the authority of the state of Wisconsin to regulate union security agreements. This contention ignores the substantive differences between the two cases. As pointed out above, *Plankinton* involved independent conduct which constituted unfair labor practices under section 8 of the NLRA. No such conduct was involved in *Algoma*, wherein the Wisconsin Board's order directing the

employer to reinstate an employee discharged under an unlawful union security agreement was held properly within the power reserved to the states under the National Labor Relations Act. In this connection it is interesting to note that *Algoma* has been cited with approval in numerous decision of this Court subsequent to the decision in *Plankinton*.[3]

In a case closely on point, *Willard* v. *Huffman*, 250 N.C. 396, 109 SE 2d, 233, cert. denied 361 U.S. 893 (1959), the Supreme Court of North Carolina considered a lower court judgment awarding damages to an employee who was discharged from his employment for non-membership in a union in violation of the North Carolina right to work law. The defendant employer contended that the discharge was an unfair labor practice under section 8(a)(3) of the NLRA, and thus subject to exclusive jurisdiction of the NLRB. After reviewing the entire range of pre-emption cases under the NLRA, the North Carolina Supreme Court stated:

> "If the courts of this state are not open for adjudication of the plaintiff's claim for damages in tort, based on his wrongful discharge, pursuant to the provisions of our Right to Work Act, then there is no forum in either the federal or state judicial systems where the plaintiff can have his rights litigated and determined. * * *
>
> "Our courts, in the case before us, are not seeking to administer the provisions of section 8(a)(1) and (3) of the Labor Relations Act, Title 29, USCA; they seek only to enforce the provisions of our own Right to Work Act, provisions which have no counterpart in the National Labor Relations Act. * * * As heretofore pointed out, our

[3] See Teamsters Union v. Oliver, 358 U.S. 283 (1959), footnote 10, p. 296.

> Right to Work Act has been held to be constitutional by this court and by the Supreme Court of the United States, *Whitaker* v. *State of North Carolina* [335 U.S. 525]"

The North Carolina Supreme Court affirmed the award of damages to the discharged employee. A petition for certiorari to review that decision was denied. 361 U.S. 893 (1959).

It may also be observed that appellants herein have attempted to attribute undue and unwarranted weight to one sentence wherein the *Garmon* decision states:

> "When an activity is arguably subject to section 7 and section 8 of the Act, the States as well as the federal courts must yield to the exclusive competence of the National Labor Relations Board."

If agency shop agreements are even "arguably" subject to section 8, appellants argue, they are thus within this broad language of *Garmon* and automatically preempted. Other portions of the majority opinion of *Garmon* disclose, however, that there are other considerations that apply. For example, the court stated (page 243):

> "When the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the states from acting. However, due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the states of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations

Act. See *International Asso. of Machinists* v. *Gonzales*, 356 U.S. 617, 2 L.Ed. 2d 1018, 78 S.Ct. 923. *Or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.*"[4] [Emphasis added.]

From the foregoing it can be quite forcefully argued that state laws regulating union security agreements deal with activities of a "merely peripheral concern of the Labor Management Relations Act" and thus under this language of the *Garmon* decision are beyond the scope of the pre-emption rule. It can perhaps be even more strongly argued that state regulation of compulsory unionism touches "interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the states of the power to act."

Further evidence that the *Garmon* decision does not automatically strike down state authority in dealing with activity "arguably" within the compass of section 7 or section 8 of the National Labor Relations Act is found in the fact that this formula was not followed in the recent decision of this Court in *Smith* v. *Evening News Assn.*, 371 U.S. 195, (1962). That case involved a suit by union employees of a newspaper against the newspaper publisher to recover damages for loss of wages during a strike called by another

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[4] Citing *United Automobile Workers* v. *Russell*, 356 U.S. 634; *Youngdahl* v. *Rainfair*, 355 U.S. 131; *Auto Workers* v. *Wisconsin Board*, 351 U.S. 266; *Construction Workers* v. *Laburnum*, 347 U.S. 656.

union. The facts alleged in the complaint made out an unlawful discrimination against the union employees under section 8(a) of the National Labor Relations Act. The trial court dismissed the suit and the Supreme Court of Michigan affirmed the dismissal relying upon the *Garmon* case. The Michigan court concluded that since the conduct complained of was "arguably" within the range of sections 7 and 8 of the National Labor Relations Act the National Labor Relations Board thus had exclusive jurisdiction. Upon review, this Court ruled that the authority of the National Labor Relations Board to deal with an unfair labor practice which also violates a collective bargaining contract is not exclusive and does not destroy the jurisdiction of state or federal courts to entertain such cases.

It is also notable that the *Garmon* decision cited with approval *Machinists Union* v. *Gonzales*, 356 U.S. 617 (1958) and *Auto Workers* v. *Russell*, 356 U.S. 634 (1958), in both of which cases state court action was sustained even though the facts showed conduct arguably an unfair labor practice under section 8. In the *Gonzales* case this Court stated:

> "It might be abstractly justifiable, as a matter of wooden logic, to suggest that an action in a state court by a member of a union for restoration of his membership rights is precluded. In such a suit there may be embedded circumstances that could constitute an unfair labor practice under section 8(b)(2) of the Act.
>
> * * *
>
> "If, as we held in the *Laburnum* case, certain state causes of action sounding in tort are not displaced simply because there may be an argumentative coincidence in the facts adducible in the tort action and a plausible proceeding before the Na-

tional Labor Relations Board, a state remedy for breach of contract also ought not be displaced by such evidentiary coincidence when the possibility of conflict with federal policy is similarly remote."

In the light of these considerations the *Garmon* decision cannot be read as imposing an absolute pre-emption formula such as appellant contends. There is no compelling congressional direction affecting agency shop agreements, and state authority to regulate such agreements remains unimpaired by the *Garmon* case.

CONCLUSION

There is nothing in the National Labor Relations Act, or in ordinary common sense, to support the conclusion that the words "as a condition of employment membership therein" in section 8(a)(3), were intended by Congress to have any different meaning than the words "membership in a labor organization as a condition of employment" in section 14(b). If these parallel phrases were intended as having different meanings it it most logical to assume that Congress would have expressly pointed out the difference.

In the absence of any such evidence reason dictates that the forms of union security that Congress intended to authorize in section 8(a)(3) are exactly and precisely the same as those which it intended to leave to the States under section 14(b). Consequently, if agency shop agreements are permitted under section 8(a)(3) they are also subject to regulation by the States under section 14(b).

If, on the other hand, the word "membership" in section 8(a)(3) is to be construed, as it has been by the Circuit Court of Appeals for the Sixth Circuit, as

authorizing only agreements which require membership, it follows that agency shop agreements must be regarded as prohibited under the federal Act, and the question of whether the States may prohibit such agreements becomes academic.

The suggestion that these same words should be construed broadly in the one case to validate agency shop agreements, but narrowly in the other so as to limit state authority to regulate such agreements, so violently assails normal logic and rules of reason that it is difficult to believe it is intended to be taken seriously.

For the foregoing reasons the judgment of the Supreme Court of Florida should be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 13

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL 1625, AFL-CIO, and WILLIAM TRAVIS, President of Retail Clerks International Association, Local 1625, AFL-CIO, *Petitioners,*

v.

ALBERTA SCHERMERHORN, LOIS DEVITA, JOYCE E. THURO, and LARRY STARK, *Respondents.*

On Writ of Certiorari to the Supreme Court of Florida

REPLY BRIEF FOR PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 368

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL 1625, AFL-CIO, and WILLIAM TRAVIS, President of Retail Clerks International Association, Local 1625, AFL-CIO, *Petitioners*,

v.

ALBERTA SCHERMERHORN, LOIS DEVITA, JOYCE E. THURO, and LARRY STARK, *Respondents*.

On Writ of Certiorari to the Supreme Court of Florida

REPLY BRIEF FOR PETITIONERS

INTRODUCTION

Respondents' position before the Court is supported by *amici curiae* briefs filed by the U.S. Chamber of Commerce, the Commonwealth of Virginia, and the State of Florida. Florida's *amicus* brief is joined in by twelve other "right-to-work" States.

With insignificant exceptions, these *amici curiae* make no arguments which are not also made by respondents, and, therefore, we shall fully answer them by answering re-

spondents. It should be noted, however, that the *amici* briefs contain factual inaccuracies[1] and unsupported expressions of opinion.[2]

I. Respondents Totally Ignore the Words "Membership in A Labor Organization" of § 14(b), and They Similarly Ignore Petitioners' Duty to Represent All Bargaining Unit Employees.

Our opening brief discusses at length the meaning of "membership in a labor organization," which are the critical words of § 14(b). As the Court has said, "we must, of course, start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used." *Richards* v. *United States*, 369 U.S. 1, 9 (1962). "Membership" has ordinary and substantive meaning in § 14(b), as it does in other sections of the Labor Act, other federal statutes, and many decisions of this Court. (Petitioners' Br., pp. 25-33.)

Respondents' brief barely mentions the language of § 14(b). Quite to the contrary, respondents' brief would lead one to think that the language of § 14(b) expressly

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[1] In its statement of facts, the Chamber of Commerce asserts (C. of C. *Amicus* Br., p. 2):

"This cause stems from the objections of four persons . . . to their employer deducting money from their wages to support Local 1625. . . ."

The contract in question does not require or permit the employer to deduct service fees from the wages of non-union employees. On the contrary, the contract expressly provides that the employer may deduct initiation fees and dues only from the wages of union members voluntarily authorizing such deductions (R. 13 [Art. 19, Sec. 1, p. 14]).

The Chamber of Commerce asserts that under an agency shop agreement an employee who is not a union member must pay "union special assessments required of union members" (C. of C. *Amicus* Br., p. 4). This assertion, to the extent that it was intended

authorizes the states to prohibit "compulsory unionism," not "membership in a labor organization."

Respondents impliedly ask this Court to ignore the language of § 14(b) and to determine its meaning solely on the basis of several selected quotations from its voluminous legislative history. The transparency of respondents' position was suggested in *Greenwood* v. *United States*, 350 U.S. 366, 374 (1956), where Justice Frankfurter quoted the wag who said, "When the legislative history is doubtful, go to the statute."

Respondents' egregious failure even to discuss the language of the statute is a tacit concession that, in order for respondents to prevail, the Court must ignore Congress's language and rely exclusively on fragments of the legislative history. As will be demonstrated hereafter, those

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to apply to the case at bar, is completely untrue. Under the contract at bar, no payments are required of non-member employees except for initial and monthly service fees for collective bargaining services (R. 3-4). The contract expressly provides that, other than service fee payments, "employees who do not choose to join the Union shall be under no further financial obligations or requirements of any kind to the Union" (R. 4), nor is it alleged in the complaint that non-member employees might under any conceivable circumstances be required to pay "special assessments."

[2] Virginia expresses this opinion in its brief (Va. *Amicus* Br., p. 4-5):

"Under the policy of 'Right-to-Work' labor unions, management and workers have prospered in this State. Labor-Management relations have been good and the 'climate' thus produced has been conducive to the establishment within the State of new industries which have provided job opportunities to a growing population and strength to the State's economy."

Although this assertion by the Commonwealth of Virginia is plainly immaterial to any issue in this case, the view of some economists and students of labor relations is that right-to-work laws tend to produce economic results the opposite of those suggested by Virginia. See, *e.g.*, Toner, Right-to-Work Laws: Public Frauds, 8 Lab. L. J. 193 (1957).

parts of the legislative history on which respondents rely are out of context and inconclusive.

The Florida Supreme Court reasoned that Article 19, Section 2, of the contract is a "subterfuge" to escape the state's power to prohibit "membership" (R. 24). Respondents do not make even this tenuous argument, apparently conceding that Article 19, Section 2, does not compel "membership" in any sense. Instead, respondents contend § 14(b) permits the States to prohibit "compulsory unionism," regardless of "membership" requirements. (Respondents' Br., p. 39.)

Respondents similarly make no real effort to respond to the argument in our opening brief that, under the *Steele* v. *Louisville & Nashville R. Co.*, 323 U.S. 192 (1944), and *Syres* v. *Oil Workers*, 350 U.S. 892 (1955), line of cases, petitioners have an affirmative statutory duty to represent all bargaining unit employees equally, even though this duty may be very costly to petitioners. (Petitioners' Br., pp. 33-37.) If there is even an implicit answer to this argument in respondents' brief, it is this (Respondents' Br., p. 44):

> "More fundamental than the claim of this wealthy, tax-exempt union for a broader distribution of collective bargaining costs is the inherent right of the respondents, and all persons, to work for a living without fear or coercion. The right to work is an individual liberty of the highest order, and one that should not be subordinated to the economic claims of any organization, whether it be a labor union, lodge, church, political party or any other group."

Respondents' "right-to-work" is not remotely at issue here: the issue is whether Florida has the power under §14(b) to immunize respondents from sharing the costs of

collective bargaining services which petitioners, by law, must provide.

Not only respondents but also the *amici curiae* who support respondents have wholly ignored the plain language of § 14(b) and the statutory duty imposed on petitioners to represent respondents in collective bargaining. These arguments remain unanswered.

II. The Fragments of Legislative History in Respondents' Brief Do Not Show That Congress Intended to Confer Jurisdiction on State Courts to Regulate the Contract At Bar.

Our opening brief discusses at length the legislative history of § 14(b), showing that Congress's main purpose was to authorize the States to regulate the closed shop and the union shop, *i.e.*, agreements "requiring membership in a labor organization as a condition of employment." (Petitioners' Br., pp. 40-46.) We show there that the language of § 14(b) is not an inadvertent, inexact way of granting the States *carte blanche* power to outlaw *all* kinds of compulsory agreements. It is an unambiguous and precise statement of Congress's intention.

Respondents' brief ignores all the legislative history cited in our brief, and instead it refers solely to selected parts of the legislative history of § 14(b).

Respondents' brief quotes a statement of Senator Taft that some States had enacted laws to make "all forms of compulsory unionism" illegal (Respondents' Br., p. 12); from the report of the House managers to the effect that § 13 of the original House Bill was intended to assure that "nothing in the Act was to be construed as authorizing any closed shop, union shop, maintenance of membership, or

other form of compulsory unionism agreement in any state where the execution of such agreement would be contrary to state law" (Respondents' Br., p. 13); from the House Conference Report to the effect that § 14(b) was intended to assure that "nothing in the Act was to be construed as authorising any closed shop, maintenance of membership, or other form of compulsory unionism agreement in any state where the execution of such agreements would be contrary to state law" (Respondents' Br., p. 14).

These isolated quotations constitute all of the legislative history on which respondents rely to show that Congress's use of the words "membership in a labor organization" was inadvertent, accidental and unintended.

The portions of the legislative history quoted above are far from dispositive, for each of them appears in the context of a discussion of "membership" requirements, merely stated in other terms.[8] While some committee reports and individual legislators casually expressed the belief that § 14(b) was intended to permit the States to prohibit "compulsory unionism" or "all forms of compulsory unionism," these words were not the words chosen by Congress when it translated its intention into law. They are, at best, inexact and nebulous phrases, and it is a matter of speculation what they meant in 1947 or what they mean today.

Surely Congress did not intend to permit the States under § 14(b) to prohibit all agreements requiring "compulsory unionism" in the sense of any compulsory relationship with

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[8] Respondents not only ignore all the contrary legislative history cited in our opening brief, including several explicit statements by Senator Taft, but also they ignore such contemporaneous cases as *A.F. of L.* v. *Watson* 327 U.S. 582(1946), to which Congress itself referred. (See Petitioners' Br., pp. 45-46.)

a union, for such an interpretation would virtually nullify those substantive provisions of the Act which authorize unions to serve as exclusive bargaining agents. See, *e.g.*, §§ 8(a)(5), 8(d)and 9(a). A union's power and responsibility as exclusive bargaining agent to negotiate wages, hours, seniority rights, working places and other conditions of employment in a collective bargaining agreements are enormous. The compulsion which arises from such an exercise of statutory power and responsibility is far more important than the power to require by contract that non-member employees pay a share of the union's actual collective bargaining costs. While such an interpretation of § 14(b) to authorize the States to prohibit such "compulsory unionism" seems ludicrous, the Supreme Court of Louisiana has recently so held. A union may not be an exclusive bargaining agent in that state, *Piegts* v. *Meat Cutters*, 228 La. 131, 81 So. 2d 835 (1955). The Florida courts below cited this case with approval in support of their view of § 14(b) (R. 29-30). (See Petitioners' Br., 21-23.)

In recent weeks the Wyoming legislature has enacted a statute which expressly provides that "no person is required to have any connection with . . . any labor organization." Wyoming Statutes, Ch. 39, L. 1963, Sec. 5. (B.N.A. State Labor Laws 61:261.) Literally interpreted, this Wyoming statute would proscribe all exclusive bargaining rights, exclusive hiring arrangements and other substantive features of the federal Labor Act, presumably on the theory that § 14(b) authorizes such an exercise of state power.

Even more important, respondents do not cite a single reference in the entire legislative history of § 14(b) to any statement by any Committee or legislator that § 14(b) was intended to permit the States to proscribe and regulate con-

tractual arrangements requiring employees to pay a ratable share of an exclusive bargaining agent's actual costs of collective bargaining.

Because they are aware of this weakness in their case, respondents argue that the agency shop (or the service fee arrangement herein) is "of recent origin, having come into use only within the past ten years. At the time the Taft-Hartley Act was enacted in 1947, the term was unknown, *and for this reason*, there is no reference to it anywhere in the reports and debates leading to passage of the Act." (Respondents' Br., p. 11.) (Emphasis added.) This assertion is simply untrue.

Contrary to respondents' assertion, the agency shop and similar arrangements were well-known in 1947. As pointed out both in our petition for *certiorari* and in our opening brief, the service fee has been common in American industry at least since 1942. Millis and Montgomery, Organized Labor 484 (1945). In 1943, the War Labor Board ordered parties to include service fee provisions in their contracts. See, *e.g.*, *Alexander Primas, Co.*, 21 War Labor Bd. Reps. 219, 221 (1943). Moreover, the "agency shop," sometimes known as the Rand Formula, was popularized by a well-known arbitration decision rendered by Canadian Chief Justice I. C. Rand in January of 1946. *Ford Motor Co. of Canada*, 1 Lab. Arb. Reps. 439 (1946).

That Congress was aware of the agency shop and similar arrangements is made clear by the fact that Senator Taft himself spoke of the Rand Formula on the floor of the Senate. 93 Cong. Rec. 4887, 2 Leg. Hist. of LMRA 1422. The *Ford Motor* decision was also referred to in testimony before the Senate Labor Committee by Secretary of Labor

Schwellenbach. (Hearings before the Committee on Labor and Public Welfare, 80th Cong., 1st Sess. on S. 55 and S.J. Res. 22, pp. 64-67.) (See also Br. of Labor Board in *N.L.R.B.* v. *General Motors*, No. 404, at pp. 26-27.)

Respondents, along with *amici curiae*, also argue that the meaning of § 14(b) is made clear by the existence in 1947 of several "right-to-work" statutes which expressly prohibit compulsory fee payments of any kind to a labor organization as a condition of employment. The statutes of Virginia, North Carolina, Georgia, Tennessee, Iowa, and Arkansas are expressly relied on by respondents. (Respondents' Br., pp. 11-12, ft.n. 4.)

This argument proves too much. Assuming that Congress was aware that some state statutes in 1947 expressly prohibited agreements requiring membership in a labor organization and the other statutes also prohibited any kind of compulsory fee payments to a union, then the inescapable conclusion must be that Congress chose to validate only those which prohibited compulsory membership. With an awareness of both kinds of state laws, Congress's words in § 14(b) take on special meaning. For the issue of fee payments unrelated to union membership had already been dealt with by some of the States in 1947 when Congress was legislating on this very subject in relationship to these state laws. See, *Meade Electric Co.* v. *Hagberg*, 159 N.E. 2d 408 (Ind. App.' Ct. 1959), where the Indiana court so reasoned in interpreting the enactement of the Indiana legislature.

Like the Chamber of Commerce,[4] respondents also argue that the post legislative history of the Taft-Hartley Act

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[4] C. of C. *Amicus* Br., pp. 16-17.

shows that Congress intended to permit the States to prohibit agency shop agreements and, presumably, the service fee contract at bar. In particular, respondents rely upon a 1959 statement of Senator Goldwater of Arizona who opposed an amendment to § 302 of the Taft-Hartley Act which would have permitted employers to deduct voluntary "periodic payments" other than membership dues from the wages of employees. (Respondents' Br., pp. 14-17.)

Congress in 1959 did not in any respect deal with § 14(b), with compulsory union membership, or with the question before the Court. The issue considered by Congress in 1959 was simply whether sums of money, other than union membership dues, might be deducted, or "checked-off" by an employer from an employee's wages, with the employee's consent. This issue obviously does not relate to the legality of a service fee or agency shop contract, for the check-off provisions of § 302 are completely independent of compulsory union membership. Under § 302, an employer may honor an employee's request that his membership dues be deducted whether or not the employer even has a labor agreement. Section 302 is an "anti-kick back" law.

At the very most, therefore, Senator Goldwater's statement in 1959 is an isolated observation by a single Congressman on an entirely different issue. As this Court recently said in *United States* v. *Price*, 361 U.S. 304, 313 (1960); "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one. See, *United States* v. *United Mine Workers*, 330 U.S. 258." The view of Senator Goldwater, twelve years after the fact, who spoke to an entirely different issue, is *a fortiori* irrelevant to the Congressional intent in 1947.

III. Respondents' Insistence That This Be Called An "Agency Shop" Case is A Frivolous Effort To Evade the Principal Issue.

Much of respondents' brief is devoted to the contention that this case involves an "agency shop," not a "service fee," contract. (Respondents' Br., pp. 5, 8, 10, 31-36.) It is not clear why respondents pursue this terminological distinction, for the issues before this Court obviously cannot be changed by a descriptive label which parties themselves place on a contract clause.

It was the validity of a specific clause, Article 19, Section 2, of the contract at bar which the Florida Supreme Court held to be invalid under Florida's right-to-work law (R. 20, 25), and it is the question of Florida's power to regulate and prohibit this specific clause which was raised in the petition for *certiorari*.

Respondents' insistence that the clause at bar be called an "agency shop" clause, rather than a "service fee" clause is an effort to minimize the important differences between the clause in *General Motors Corp. v. N.L.R.B.*, No. 404, and the contract clause at bar. Both of these clauses have been referred to loosely as "agency shop" clauses, but their terms and consequences are quite different. As our opening brief explains at length, Article 19, Section 2, of the instant contract differs profoundly from the usual "agency shop" clause, such as the clause in *General Motors*. (Petitioners' Br., pp. 28-33, 57-58).

In his brief to the Court in *General Motors* on behalf of the Labor Board, the Solicitor General carefully distinguishes between the amount, use and purpose of agency

shop payments there and the service fee payments in the instant case (N.L.R.B. Br., pp. 37-38):

> "... [under the proposed clause in *General Motors*] the non-member pays the full amount of initiation fee and periodic dues. His payments go to defray not only expenses of collective bargaining, for which he receives a *quid pro quo*—such as the cost of negotiating contracts, handling grievances and taking cases to arbitration—but also to finance welfare benefits and promote organization, lobbying and political activities. Thus, while an agency shop agreement [like that in *General Motors*] may leave a non-member free of what he deems a distasteful personal association, he is nevertheless required to finance the promotion of the Union's objectives—objectives that do not benefit him directly and that he may regard as obnoxious, if not an infringement of his personal political liberty. Cf. *International Association of Machinists* v. *Street*, 367 U.S. 740.
>
> "Many practical consequences, and therefore perhaps the legal effect, of a [*Schermerhorn*-type] contract requiring non-members to pay a fee proportionate to the cost of services given and received are altogether different from the incidents of the agency shop [as proposed in *General Motors*.]"

While the Solicitor General and the Board recognize the important differences between the *General Motors* clause and the *Schermerhorn* clause, respondents simply ignore these differences. Instead, respondents insist that the fact that the *Schermerhorn* contract has sometimes been called an "agency shop" contract fixes the issues before the Court and that the actual differences between this contract and the *General Motors* clause constitute "a false and fictitious issue." (Respondents' Br., p. 10.)

This Court has observed that there is "much dispute as

to the exact meaning" of terms such as open shop, closed shop, and union shop. Surely there is as much dispute as to what constitutes an agency shop. "There is such an important difference in emphasis between these different labels that we think it better to avoid use of any of them . . ." *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U.S. 525, 528 n. 2 (1949).[5]

The notion of a service fee, based on a union's actual collective bargaining costs, is an innovation in labor relations in America. As pointed out in our opening brief, it is a forward-looking method of financing collective bargaining functions which serves the national policy of promoting responsible collective bargaining while simultaneously guaranteeing workers maximum personal liberty in choosing whether to embrace the institutional commitments of labor union membership.

A recent article in a Department of Labor publication discusses the service fee concept as "a middleway approach, under which non-members pay a share of the costs of collective bargaining." Dudra, Approaches to Union Security in Switzerland, Canada, and Colombia, 86 Monthly Lab. Rev. 136 (1963). Professor Dudra suggests that requiring non-members to pay a ratable share of the actual costs of collective bargaining services is an attractive alternative to compulsory union membership. He distinguishes a true service fee arrangement from the traditional agency shop on these grounds, *id.* 138:

> "The agency shop can be criticized on the grounds that it typically provides for the payment of full union

[5] Even respondents observe that at least eleven different names have been variously used to describe kinds of service fee arrangements. (Respondents' Br., p. 36, n. 10.)

dues by non-members. To some extent, non-members are overcharged for the services they receive and a part of their money supports union purposes and activities of which they might not approve. . . .

"The Swiss and the Colombian type of the agency shop is more equitable in this respect since non-members are taxed only in proportion to the benefits received. In addition, in Switzerland the amounts paid by non-members are earmarked for the purposes directly connected with the execution and application of collective agreements or for purposes benefiting everybody in the bargaining unit or in the trade as a whole."

Respondents simply refuse to recognize the substantive differences between the instant service fee arrangements and the *General Motors*-type clause.

IV. The Issue Litigated and Decided Below Was Whether Florida Has Power Under § 14(b) to Proscribe ANY Service Fee For Collective Bargaining Services. The Amount of the Fee Has Never Been Challenged.

Respondents' brief attempts to draw the Court's attention away from the contract clause itself and to focus on a notice posted after the contract's execution. (Respondents' Br., pp. 4-5, 33-34.) Their purpose is unclear, for this notice simply states that the amount of the service fee to be charged non-member employees will be equal to the union's dues and fees. This notice does not vary the contract; it merely explains that non-member employees are required to pay "service fees to the Local Union in order to aid the Union in meeting its authorized expenses as the exclusive bargaining agent" (R. 8).

Respondents' effort to make a serious point of the amount

of service fees cannot be the basis for changing the issues, for respondents themselves shaped the issue by attacking the validity of Article 19, Section 2, in their complaint (R. 3-4). The Florida Supreme Court squarely passed on the validity of the contract itself. The amount or reasonableness service fees has never been in issue; the sole issue has been whether *any* service fees might be charged.

The complaint specifically alleges that plaintiffs "do not want to participate in *any* Agency Shop relationship and they do not want to pay the defendant Union *any* dues or service fees or initiation fees" (R. 5). (Emphasis added.) Moreover, the specific relief sought by the complaint was that the union be restrained from receiving "any" service fees whatsoever (R. 7), regardless of amount.

The Florida Supreme Court unmistakably held that the instant contract was invalid to the extent that it required the payment of any fees of any kind, for it ruled that Florida law gives workers the right to decide whether they will "derive any benefit from association with a labor union. The choice is his to make" (R. 23). There is no hint in this decision that the *amount* of the service fees was in any way relevant to its disposition of the merits. On the contrary, the whole purport of the state court decision is that not one penny may be required of unwilling employees in Florida (R. 24), regardless of use or purpose.

Before this Court, therefore, the issue is simply whether Florida has power under § 14(b) to prohibit the required payment of *any* service fees "for the purpose of aiding the union in defraying costs in connection with its legal obligations and responsibilities as the exclusive bargaining agent of the employees in the appropriate bargaining unit" (R.

9). This was the only issue raised, litigated and decided below.

V. Although Respondents Challenge Applicability of the Preemption Doctrine, Their Arguments Concede That This Action Is Within the Exclusive Jurisdiction of the Labor Board.

In our opening brief we demonstrated that the Labor Board must decide in the first instance whether the instant contract is protected, proscribed or entirely unregulated by the Taft-Hartley Act, for Congress's comprehensive regulation of labor relations requires the States to defer to the Board's primary jurisdiction where challenged conduct is "arguably" within the regulatory ambit of the Labor Act. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959). (See extended discussion in Petitioners Br., pp. 16-24.)

Since we filed our brief, the Solicitor General and the Labor Board have filed their brief in the *General Motors* case in which they suggest agreement with this preemption argument (Labor Board Br., *N.L.R.B.* v. *General Motors*, No. 404, p. 42):

> "The National Labor Relations Board has had no occasion to rule upon whether a contract requiring payment of a true service fee as a condition of employment is outside the scope of Section 14(b) and otherwise consistent with the policies of the Act."

Respondents' main answer to our argument that the States have no jurisdiction to regulate this contract in the first instance is that the facts of this case are distinguishable from the facts of *Garmon*, a tort case which arose out of peaceful picketing. (Respondents' Br. 23-25.) This

answer is totally unresponsive, for *Garmon* was not based simply on the fact that California there sought to regulate picketing: it was based on the conflict between the Labor Board's power to regulate activities under § 8 of the Act which California sought to regulate under its law of torts. Whether the danger of conflicting regulation between federal and state agencies involves picketing, discharges, threats of discharge or other kinds of conduct is immaterial to the doctrine of federal preemption expressed in *Garmon*.

Although many of this Court's preemption cases have involved state court regulation of strikes and picketing, this Court has also struck down state regulation of a collective bargaining agreement where there was neither a strike nor picketing. *Local 24, Teamsters* v. *Oliver*, 358 U.S. 283 (1959). It has also struck down state regulation of an alleged, discriminatory discharge. *Plankington Packing Co.* v. *Wisconsin Employment Relations Board*, 338 U.S. 953 (1950) (Memorandum). The *Oliver* case, like the instant case, was an action by an employee to enjoin the operation of a labor agreement, yet the Court unhesitatingly held that the Ohio courts had no power to regulate "an agreement which was the fruit of the exercise of collective bargaining rights" under the federal Labor Act. 358 U.S. at 286.

Respondents also argue that there can be no federal preemption here for the reason that this case involves "no union picketing or strike, or any other course of action that could independently be said to be an unfair labor practice under § 8. (Respondents' Br., p. 29.) This argument is also made by the State of Florida. (Florida *Amicus* Br., p. 18.)

While the distinction between strikes and picketing on the one hand and other activities in interstate commerce on

the other hand is patently specious, *Oliver* and *Plankington Packing Co., supra,* it is not necessary for the Court to decide here whether the doctrine of federal preemption turns on such a fine distinction, for this case does involve *independent conduct* beyond the mere execution of a contract. Respondente' complaint alleges unfair labor practice *conduct* by the union and the employer herein pursuant to the terms of the contract (R.5):

> "That the Agency Shop clause is being enforced by the defendant Union, the defendant President of the Union, and the Union's representatives and agents. *The plaintiffs have been orally advised within the past two (2) weeks that if the plaintiffs do not join the Union or pay the initial service fees and monthly service fees, that they will be discharged by the defendant Employer.*" (Emphasis added.)

Thus, the complaint flatly alleges that respondents have been *threatened with discharge* unless they comply with Article 19, Section 2, of the contract by paying the requisite service fees. Moreover, respondents' complaint seeks to restrain these alleged threats of discharge, specifically asking for this injunctive relief against petitioners and the employer (R. 6):

> "(b) From inducing, encouraging, aiding, ordering, or causing employees of the defendant Employer *to discharge the employee plaintiffs as a means of forcing the defendant Employer to enforce any such agreement or provision.*" (Emphasis added.)

There can be not the slightest doubt that threatening employees with discharge for failure to pay money to a labor organization is arguably a violation of §§ 8(a)(1) and (3) and §§ 8(b)(1)(a) and (2) of the Labor Act, as an invasion of § 7 rights, except where such threats are made

pursuant to a lawful agreement. See, *e.g.*, *Radio Officers Union* v. *Labor Board*, 347 U.S. 17, 42-43 (1954); *Labor Board* v. *Pappas & Co.*, 203 F.2d 569 (9th Cir. 1953); *Labor Board* v. *United Hoisting Co.*, 198 F.2d 465 (3d Cir. 1952), Cert. denied 344 U.S. 914; *Puerto Rico S.S. Assn.* v. *Labor Board*, 281 F.2d 615 (D.C. Cir. 1960).

If the foregoing reasons were not sufficient to establish the applicability of the federal preemption doctrine in this case, several candid admissions in respondents' brief abundantly show that the state court below has intruded on the primary jurisdiction of the Labor Board to administer the federal Labor Act. First, respondents assert (Respondents' Br., p. 37):

> ". . . Section 7 of the National Labor Relations Act guarantees the right of employees not only to join, form and *assist* labor organizations, but also to refrain from joining, forming or *assisting* labor organizations. It must certainly be admitted that the discharge of an employee for failure to pay money for the purpose of *assisting* a labor union to defray its costs, whatever these costs might be, would deny him this fundamental right protected by section 7 to refrain from *assisting* a labor union." (Emphasis in original.)

Thus, respondents themselves say that "it must certainly be admitted" that enforcement of Article 19, Section 2 of this contract would be an unfair labor practice as an alleged interference with employees' § 7 rights under the federal Act. While we believe that this contract is arguably protected under the Act as a legitimate subject of bargaining, we agree with respondents' candid admission that this contract is at least arguably unlawful under the federal Act, which necessarily brings this contract well within the

Board's exclusive competence to adjudicate alleged unfair labor practices.

Lest there be any doubt that respondents have conceded N.L.R.B. jurisdiction over the subject matter of this action respondents make another argument, the substance of which is that this contract might be found by the Labor Board to impose unlawful discrimination against members of the bargaining unit who are not union members (Respondents' Br., pp. 41-42):

> "The Board has also held that a union which charges fees for services rendered non-members thereby prejudices its status as the bargaining agent. *Hughes Tool Co.*, 104 NLRB 318. In that case, the Board indicated it would revoke the certification of a union if it did not abandon its claimed right to charge a service fee of $15 for handling grievances of non-union members, and other service fees in varying amounts. Thus, petitioner herein, in asserting its claim to 'service fees' may not be aware of this threat to its right to continue as bargaining agent."

Again, from respondents' own brief comes a compelling reason for the applicability of the preemption doctrine to this case. While we do not agree with respondents' legal conclusions that the N.L.R.B. should or would find the instant contract to constitute an unfair labor practice, we do agree with respondents that the contract is well within the ambit of the Board's exclusive regulatory power. *Hughes Tool Co.*, 104 NLRB 318 (1953), relied on by respondents, involved a collective bargaining relationship in Texas, which has a right-to-work statute very much like the Florida law at bar. Tex. Rev. Cir. Stat. Art. 5154g (Supp. 1960). The union there imposed a fee system on non-member employees of $15 to process each grievance and

$400 to take a grievance to arbitration. According to the Board, 104 NLRB at 324:

> "The issue . . . is whether the imposition of these fees is in derogation of the duties of the bargaining representatives to provide an equal representation to all employees in the unit, or is only a justifiable measure to control and discourage 'free riders.'"

The Board observed that Texas's right-to-work statute, like Florida's, is written in the language of § 14(b) to prohibit "membership" in a labor organization as a condition of employment, and the Board held that, as a matter of federal law, the fees charged non-members were discriminatory and contrary to the union's duty as exclusive bargaining agent of all employees. 104 NLRB at 329. Although *Hughes Tool* is factually distinguishable from the case at bar,[8] both involve service fee charges to non-members in right-to-work states. It is perfectly clear, therefore, that such arrangements are subject to the Board's regulatory power.

VI. Respondents' Reliance On § 8(a)(3) Is Misplaced as A Basis For Explaining Congress's Plain Intention and Its Words in § 14(b).

Respondents' brief reflects a stark inability to reconcile the language of § 14(b) with the decision of the court below. Therefore, in an effort to show that Congress did not really mean what it said in § 14(b), respondents urge that it is § 8(a)(3)—not § 14(b)—which best explains what Congress

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[8] In *Hughes* the union refused to represent non-members unless they paid the fees in question. Here the union is willing to represent all employees. There the fees were imposed by the union unilaterally, whereas here the fees are required by a collective bargaining agreement.

intended to achieve by § 14(b). But even as to § 8(a)(3), respondents argue that Congress's words do not express Congress's real intention.

Respondents' argument is as follows: § 14(b) authorizes the States to proscribe agreements requiring "membership in a labor organization" as a condition of employment; § 8(a)(3) expressly authorizes parties to make agreements requiring "membership" as a condition of employment; however, a proviso to § 8(a)(3) provides that employees may not be discriminated against for non-membership, if "membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership." Therefore, respondents argue, § 8(a)(3) does not really authorize a "membership" requirement but only a dues and fees requirement, and § 14(b) by parity of reasoning thus authorizes the States to prohibit any agreement requiring that employees pay any sum of money to a labor organization. (Respondents' Br., pp. 18-22.) Based on this tortuous reasoning, respondents conclude that: "It follows that for section 14(b) to have any meaning it can only be construed as preserving to the states the authority to regulate the same forms of union security agreements as are authorized or permitted under section 8(a)(3)." (Respondents' Br., p. 22.) This argument is a series of misconceptions.

First, if Congress had intended to authorize the States to proscribe under § 14(b) "the same forms of union security as are authorized" under federal law, Congress would have done so. It did not do so because § 8(a)(3) and § 14(b) have different purposes. See Petitioners' Br., pp. 59-63. See also *Schwegemann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951).

Second, § 8(a)(3) expressly and unambiguously authorizes agreements requiring "membership"; it does not merely authorize agreements requiring employees to pay money to a union. Section 8(a)(3) provides:

> "... nothing in this Act ... shall preclude an employer from making an agreement with any labor organization ... to require as a condition of employment *membership* therein ..." (Emphasis added.)

Third, the second proviso to § 8(a)(3) does not erase the express permission to execute agreements requiring "membership." It merely provides that:

> "no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such *membership was not available* to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that *membership was denied or terminated* for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; ..." (Emphasis added.)

Fourth, the second proviso of § 8(a)(3) provides safeguards on the use of "membership" requirements over job rights. It reflects Congress's concern over past abuses of the closed shop. Since § 14(b) authorizes the States to prohibit "membership" requirements altogether, the second proviso to § 8(a)(3) obviously is not relevant to § 14(b), and there is no parity between these two sections.

Fifth, as our opening brief explains fully, the Congress, the N.L.R.B., the federal courts and others have said that § 8(a)(3) does authorize more than just money payments to a union. It authorizes parties to write contracts requiring

"membership," which includes a willingness to join. (Petitioners' Br., 45-46.) To be sure, the second proviso to § 8(a)(3) provides that an employer may not "justify any discrimination against an employee for non-membership," if "membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership." But surely this does not mean, as respondents assert, that the federal Act does not authorize the execution of agreements requiring "membership" in a labor union as a condition of employment. The power to write a contract which states a membership requirement is itself vitally important, for most employees voluntarily abide by the contract's terms.

For these reasons, § 8(a)(3) offers little comfort to respondents' view that the words of § 14(b) are not indicative of Congress's intention. The contrary is the case, for "membership" is the key concept in both sections. Respondents ignore the "membership" concept altogether.

The cases which respondents cite in support of the proposition that § 8(a)(3) does not authorize the execution of agreements requiring "membership" in a labor organization are patently inapposite. Our opening brief discusses in great detail the decision of the Seventh Circuit in *Union Starch & Refining Co.* v. *Labor Board*, 186 F.2d 1008 (7th Cir. 1951), cert. denied 342 U.S. 815. This case, contrary to respondents' assertion, holds that an employee must be willing to become a union member under § 8(a)(3). (Petitioners' Br., pp. 50-52.) In its petition for *certiorari* to this Court, the N.L.R.B. in that case said that its interpretation of proviso (B) of § 8(a)(3) "rests on the premise that the employees . . . manifested a desire to become union mem-

bers." (N.L.R.B. Brief in Opposition to Pet. for Cert., at p. 16, Oct. Term, 1951, No. 64.)

N.L.R.B. v. *Philadelphia Iron Works*, 211 F.2d 937 (3d Cir. 1953), is similarly inapposite. This case involved discrimination by a union against a union member under an exclusive referral system and a union shop. There was no question in this case about the right to require membership under § 8(a)(3) because the employee in question had been a member of the union "in good standing" for many years. The only issue was whether the union could discriminate between its members in making job referrals.

Respondents' reliance on *N.L.R.B.* v. *Pape Broadcasting Co.*, 217 F.2d 197 (5th Cir. 1954), is similarly misplaced. The employee in the *Pape* case was perfectly willing and, indeed, anxious to become a member of the union, but he was denied membership. The court's decision quotes the employees' testimony that he "had made application for membership in the union." (217 F.2d at 202). Notwithstanding this employee's willingness to join the union he was *denied* membership and was therefore unlawfully discharged. This is a case under § 8(a)(3) where a union simply refused to admit an employee into membership, yet the union sought to affect the employee's job rights because of his non-membership.

Finally, respondents' reliance on *N.L.R.B.* v. *Local 504, Machinists*, 203 F.2d 173 (9th Cir. 1953), is quite wrong. In this case an employee was discharged at the union's request after the union itself had suspended him from membership for dual-unionism and had fined him $500. This case involved no more than the union's refusal to readmit this employee into membership unless he paid the $500 fine. The employee was plainly willing and eager to join

the union, but, as the Ninth Circuit's decision recites, he was "denied membership in the Union, that denial was because of his failure to pay a fine." 203 F.2d at 176.

For these reasons, respondents' argument, that § 8(a)(3) does not permit a "membership" requirement, and that therefore § 14(b) must authorize the states to prohibit something other than "membership," does bear close analysis. Section 8(a)(3) and § 14(b) are not parallel, because they have different purposes, as is made quite clear by the brief of the Solicitor General on behalf of the N.L.R.B. in the *General Motors* case. (N.L.R.B. Br., *N.L.R.B.* v. *General Motors Corp.*, pp. 40-41.)

It is clear that § 8(a)(3) permits agreements requiring membership; § 14(b) authorizes the states to prohibit agreement requiring membership, nothing more. Membership is the essential concept of both sections.

Conclusion

For the reasons set forth above, the judgment of the Supreme Court of Florida should be reversed and vacated.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 13

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL 1625, AFL-CIO, *et al., Petitioners,*

v.

ALBERTA SCHERMERHORN, *et al., Respondents.*

On Writ of Certiorari to the Supreme Court of Florida

BRIEF FOR PETITIONERS ON REARGUMENT

THE ISSUE TO BE REARGUED

In its decision of June 3, 1963, the Court restored this case to its calendar for reargument on the following issue, 373 U.S. 746, at 747-748:

> (W)hether the Florida courts, rather than solely the National Labor Relations Board, are tribunals with jurisdiction to enforce the State's prohibition against such [agency shop] arrangements.

In response to this question, there are three main alternatives for remedying a union security contract in violation of a valid state law enacted under § 14(b)[1] of the federal

[1] Section 14(b). Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

Labor Act, 29 U.S.C. § 164(b): exclusive federal remedies, exclusive state remedies, and dual remedies based on concurrent regulation by both federal and state authorities. Section § 14(b) does not explicitly confer any remedial power on the States. If the States have remedial power, therefore, it must emanate from some source other than the language of § 14(b) itself.

Because petitioners believe that execution of such a contract constitutes a federal unfair labor practice, they urge that the National Labor Relations Board's remedial power be declared exclusive in order to avoid intolerable consequences for the administration of the nation's principal labor relations statute. This view is supported by the overall design of the Labor Act, by its legislative history, by considerations of national labor policy, and by leading decisions of this Court.

SUMMARY OF ARGUMENT.

1. Execution of a compulsory union membership contract in violation of a state statute prohibiting such a contract constitutes a federal unfair labor practice. Compulsory membership contracts may be lawfully executed as a matter of federal law only when "authorized" by § 8(a)(3)'s first proviso. However, § 14(b) removes the authorization of that proviso when state law prohibits such a contract, which means that federal law prohibits such contracts when they are prohibited by state policy. It is quite common for federal law to allow the States to declare a policy which may be enforced solely by federal authorities. The federal Assimilative Crimes Act of 1948, 18 U.S.C. § 13, 54 Stat. 234, is a familiar example. Many other examples of federal absorption of state policy are cited in *United States* v. *Sharpnack*, 355 U.S. 286, 294-296.

2. Federal remedies should be applied exclusively, for the remedies provided by the States' "right-to-work" laws

are incongruous with the remedial scheme of the federal Act. For example, eleven of the present "right-to-work" statutes make violations criminal offenses, subjecting violators to imprisonment and fines, as well as to lawsuits for actual and punitive damages. The federal Act's remedy, however, is a cease-and-desist order. Section 10(c), 29 U.S.C. § 160(c).

3. Concurrent state remedies would inevitably constitute an interference with the administration of the federal Act by the N.L.R.B., for the States could (as they have) come to opposite conclusions of fact from those reached by the Board. Not only will the Board and state courts come to different results as a matter of fact, but also, because state court power depends upon findings of fact, there will be conflicts of fact over the existence of state court regulatory jurisdiction. Such conflicts would be oppressive on commerce and an impediment to the objectives of the national labor policy. Moreover, permitting the States to remedy alleged violations of their "right-to-work" laws will constitute an invitation and a temptation to the state courts to regulate all related aspects of labor relations.

4. The legislative history of § 14(b) contains no evidence that Congress intended to permit the States to fashion and apply their own remedies for conduct which constitutes a federal unfair labor practice, as well as a violation of their "right-to-work" laws. While Congress did not focus on this question, the absence of *any* discussion of the problems inherent in a scheme of concurrent jurisdiction reveals that Congress did not intend to unleash the severe consequences which would follow such concurrent jurisdiction. Moreover, Congress' adoption of the language of § 14(b), and its rejection of the language of § 13 of H.R. 3020, strongly points to an intention to make federal remedies exclusive.

5. *Algoma Plywood & Veneer Co.* v. *Wisconsin Employment Relations Board*, 336 U.S. 301, is no barrier to holding

federal remedies exclusive here. *Algoma*, decided principally under the Wagner Act, did not even deal with the two major questions here, *i.e.*, whether violation of a "right-to-work" law constitutes a federal unfair labor practice and, if so, whether the federal remedy should be exclusive. The issue in *Algoma* was whether the Wagner Act prevented both a prohibiting state policy and a state remedy.

6. The preemption doctrine is fully applicable here, for state court remedies, which inherently interfere with the policies and procedures of the federal Board, have consistently been declared preempted even when asserted for violation of "right-to-work" laws, *Electrical Workers, Local 429* v. *Farnsworth & Chambers*, 353 U.S. 969; *DeVries* v. *Baumgartner's Elec. Construction Co.*, 359 U.S. 498; *Local 438, Construction & General Laborers* v. *Curry*, 371 U.S. 542.

ARGUMENT

I. Execution Of A Compulsory Membership Contract in Violation Of A Valid State Law Constitutes A Federal Unfair Labor Practice.

Does federal law prohibit the execution or application of contracts in violation of state statutes (known as "right-to-work" laws) which prohibit compulsory membership agreements? The intimate interrelationship between §§ 7, 8(a)(3) and 14(b) of the Labor Act can leave no doubt that execution of such contracts constitutes a federal unfair labor practice.

Section 7,[2] 29 U.S.C. § 157, guarantees employees "the right . . . to form, join, or assist labor organizations . . .

[2] Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining

and . . . to refrain from any or all of such activities except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as *authorized* in section 8(a)(3)."[3] Therefore, except where a union membership contract is expressly "*authorized*" by §8(a)(3), §7 guarantees the right of employees "*to refrain from*" joining

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or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

[3] Sec. 8(a)(3). It shall be an unfair labor practice for an employer . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with any labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; . . .

or assisting a labor organization. Does § 8(a)(3) "authorize" the execution or application of a union membership contract in a "right-to-work" state? Plainly not.

Section 8(a)(3) implements § 7 rights by prohibiting "discrimination . . . to encourage . . . membership in any labor organization," with the single exception of when an agreement is made requiring union membership in accordance with the first proviso to § 8(a)(3). However, § 14(b) provides that "nothing in this Act shall be construed as authorizing" a contract requiring union membership in violation of state law. Because § 14(b) makes it perfectly clear that § 8(a)(3)'s first proviso cannot "authorize" a compulsory union membership contract in a "right-to-work" state, such a contract *ipso facto* constitutes illegal discrimination "to encourage . . . membership" under § 8(a)(3) in violation of employees' § 7 rights. In contemplation of law, § 14(b) operates as an additional proviso to § 8(a)(3).

This analysis was suggested by the Court's initial decision in this case, 373 U.S. at 756:

> Without the proviso to § 8(a)(3) and a similar savings clause in § 7, conditioning employment upon union membership would be an obvious unfair labor practice, under §§ 8(a)(1), 8(a)(3), and 8(b)(2), as Congress recognized in adding the proviso to § 8(3). With the proviso, however, such arrangements, if they comply with the terms of the proviso, are not unfair practices. Section 14(b), with obvious reference to § 8(a)(3), declares that "nothing in this Act" is to authorize "the execution or operation" [sic] of membership agreements in States in which such execution or operation is prohibited by state law.

The Board's cases, too, suggest that § 14(b) operates as an additional proviso to § 8(a)(3). In illustrative cases such as *Giant Food Shopping Center*, 77 N.L.R.B. 791, and *Northland Greyhound Lines*, 80 N.L.R.B. 288, the Board

long ago held that, under former § 9(e)(1), it had no statutory power to conduct a union shop authorization election in a state which prohibited the union shop, for § 14(b) does not authorize a union shop contract in such a state. Dissenting in *Giant Food Shopping Center, supra*, former Chairman Herzog observed that the Board was holding that violation of a state's "right-to-work" law was a federal unfair labor practice, 77 N.L.R.B. at 797-798:

> By declining to conduct even a consent election in a prohibiting State, the Board is declaring that a State offense becomes, *ipso facto*, a Federal offense. Any employer who discharges an employee within a prohibitive State pursuant to a union-shop agreement, and any labor organization that contributes to that result, not only violates the State enactment but also violates Section 8(a)(3) and 8(b)(2) of the Labor Management Relations Act. . . .

In his dissent in *Algoma Plywood & Veneer Co.* v. *Wisconsin Employment Relations Board*, 336 U.S. 301, 325, Justice Black similarly pointed out that the Board "has construed the new federal Act as precluding such [compulsory union membership] contracts to the same extent that they are precluded by state law." This was not a point of contention with the majority.

There is nothing unusual about this absorption of state substantive law into the scheme of a comprehensive federal regulation. On the contrary, rational administration of the federal Act requires that state policies on the question of union security be absorbed into federal law and administered by the federal agency to avoid the burden on commerce and the interference with national policy which would result from the separate fact-finding and remedial process of the 50 states.

Section 14(b) plainly permits the States to declare a policy on the subject of compulsory union membership, but

state policy then becomes a point of reference for administration of the federal law. If a state prohibits compulsory union membership agreements altogether, § 8(a)(3) of the federal law prohibits all such agreements. On the other hand, a state might decide not to prohibit, but to permit, union membership agreements. That state policy, too, is absorbed into federal law, and therein § 8(a)(3) will thoroughly regulate the kind of compulsory membership agreement which might be executed. In both cases it is the state —not the federal government—which declares the applicable policy, but in both cases, the applicable state policy becomes federal policy and becomes subject to a federal remedy.

"Examples of the uses made by the Congress of . . . state legislative action in connection with the exercise of federal legislative power are numerous." *United States* v. *Sharpnack*, 355 U.S. 286, 294. The outstanding example, of course, is the Assimilative Crimes Act of 1948, 18 U.S.C. § 13, 54 Stat. 234, which absorbs state criminal laws on federal enclaves and vessels and airplanes in certain circumstances. Many other examples are set forth in *Sharpnack*, *supra*, 355 U.S. at 294-296, involving both criminal and civil statutes of the United States.

Labor relations in interstate commerce are legally like a federal enclave in that they are subject to federal regulation exclusively. As under the Assimilative Crimes Act, therefore, state statutes prohibiting compulsory union membership become absorbed by § 14(b) into §§ 8(a)(3) and 8(b)(2), to be enforced exclusively by the N.L.R.B.

There are no significant problems of interpreting state law, for the States will continue to interpret their own laws in cases involving *intrastate* commerce or through advisory opinions. Moreover, as a practical matter, the authority given to the States under § 14(b) is limited, and there is very little for the state courts to interpret. The N.L.R.B.

has been looking to the meaning of state statutes under § 14(b) for years in administering other provisions of the Act. *Fort Industry Co.*, 77 N.L.R.B. 1287; *Giant Food Shopping Center, Inc.*, 77 N.L.R.B. 791; *Northland Greyhound Lines*, 80 N.L.R.B. 288; *Safeway Stores, Inc.*, 81 N.L.R.B. 387. See also *Labor Board* v. *General Motors Corp.*, 373 U.S. 734, where the Court affirmed the Board's finding that an employer refused to bargain in good faith concerning an "agency shop" contract in Indiana, based on the Board's determination that the Indiana courts had approved "agency shop" agreements under that state's "right-to-work" law.

For these reasons execution of a compulsory union membership agreement in violation of a valid state law enacted pursuant to § 14(b) constitutes a federal unfair labor practice. Section 14(b) uses state statutes on this subject as a reference point and integrates state policy into the administration of § 8(a)(3). As the Court said in its initial decision herein, the "connection between the § 8(a)(3) proviso and § 14(b) is clear." 373 U.S. at 757. Violation of § 8(a)(3) by execution of a contract or any other conduct in violation of a valid, applicable state statute is subject to a federal remedy under § 10(c), 29 U.S.C. § 160(c), and the federal remedy, we shall now show, should be exclusive.

II. A Uniform and Exclusive Federal Remedy Is Consistent With the Scheme Of Congressional Regulation, Whereas Divergent State Remedies Would Interfere With Administration Of the Federal Act and With National Labor Policy.

Nothing in the federal Act is so thoroughly regulated as are arrangements for so-called "union security." Sections 7, 8(a)(3), 8(b)(2), 14(b), 302 and other provisions of the Act regulate in fine detail the manner in which union security contracts may be negotiated and administered. State

power to declare a broad prohibition against compulsory membership agreements is only one aspect of this thoroughly regulated subject. It is unlikely that Congress would turn over to the States full remedial power in connection with this aspect of the federal regulation of union security arrangements, while providing for federal remedies in all other aspects. Moreover, as will be discussed hereafter, there is no evidence in the legislative history of § 14(b) that Congress intended to unleash state remedies in this sensitive area.

To demonstrate the impact of such state remedies on commerce, if the States are authorized to assert jurisdiction over this subject matter, the following chart briefly summarizes the civil remedies and criminal penalties provided on the face of the present "right-to-work" laws. While some of these statutes or constitutional provisions do not expressly provide for either civil or criminal remedies, such remedies have actually been fashioned in litigation. For example, violation of such a statute is normally regarded as tortious conduct which may be remedied both equitably and in damages. It is also important to remember in considering existing penalties and remedies that the States are perfectly free to increase these penalties as they choose, and it is not unthinkable that some of these States might make violations felonious.

STATE	STATUTE	PENALTIES	CIVIL REMEDIES
1. Alabama	Ala. Code Ann. Tit. 26 § 375 (1958)	None.	Damages.
2. Arizona	Ariz. Rev. Stat. Ann. Tit. 23, Chap. 8, §§ 23-1301.	None.	Injunctions. Damages.
3. Arkansas	Ark. Stat., Tit. 81, Chap. 2, §§ 81-202—81-204.	Misdemeanor. Fines from $100 to $5,000. Each day is separate offense.	None.
4. Florida	Fla. Stat. Ann. § 12 Fla. Constitution	None.	None.
5. Georgia	Ga. Code Ann. §§ 54-901-903 (1961)	Misdemeanor. Fine up to $1,000 and chain gang up to 6 months, or one year on chain gang. (Tit. 27, § 27-2506.)	Injunctions. Actual damages. Attorneys' fees. Costs.
6. Indiana	Ind. Stat. Ann. §§ 40-2701 to 2706	Misdemeanor. Fine not to exceed $100 and imprisonment not to exceed 10 days.	Actual damages. Attorneys' fees. Costs.
7. Iowa	Iowa Code Ann. § 736A.1 to 736A.8	Misdemeanor. Fine up to $500 and/or imprisonment up to one year. (Tit. 35, §687.7.)	Injunctions.
8. Kansas	Const. of Kans., Art. 15, § 12.	None.	None.
9. Mississippi	Miss. Code Ann. § 6984.5	None.	Actual damages.
10. Nebraska	Neb. Stat. Ann. §§ 48 217-219	Misdemeanor. Fine not less than $100 and not more than $500.	None.
11. Nevada	Nev. Rev. Stat. §§ 613.230-300	None.	Injunctions. Damages.
12. North Carolina	N.C. Gen. Stat. Ann. §§ 95-78 to 84	None.	None.
13. North Dakota	N.D. Cent. Code §§ 34-0144	None.	None.

STATE	STATUTE	PENALTIES	CIVIL REMEDIES
14. South Carolina	S.C. Code Ann. §§ 40-46 to 46.11	Misdemeanor. Fine of not less than $10 nor more than $1,000 and/or imprisonment of not less than 10 nor more than 30 days.	Injunctions. Actual damages. Punitive damages. Attorneys' fees. Costs.
15. South Dakota	S. D. Code §§ 17.1101 and 17.9914.	Misdemeanor. Fine of not more than $300 or imprisonment not to exceed 90 days or both.	None.
16. Tennessee	Tenn. Code Ann. §§ 11412.8 - 13.	Misdemeanor. Fine of not less than $100 and not more than $500 and imprisonment of not more than 12 months. Each day of violation is separate offense.	None.
17. Texas	Tex. Rev. Crim. Stat. Art. 5207A and Art. 7428-1	None.	None.
18. Utah	Utah Code Ann. §§ 34-16-1 to 18	Misdemeanor. Each day of violation is separate offense. Fine up to $300 and/or up to six months imprisonment. (Tit. 76, § 76-1—16.)	Injunctions. "Any and all damages of any character cognizable at common law."
19. Virginia	Va. Code Ann. §§ 40-68 to 40-74.	Misdemeanor. Fine not to exceed $500. Each day of continued violation after conviction is a separate offense.	Injunctions. "Any and all damages of any character cognizable at common law."
20. Wyoming	Adopted Feb. 8, 1963.	Misdemeanor. Fine not to exceed $1,000 and/or imprisonment not to exceed 6 months.	Injunctions. Damages.

In contrast to these divergent state remedies, the single remedy of the Labor Act for the commission of an unfair labor practice is the issuance of an "order requiring such person [who has violated the Act] to cease and desist from such unfair labor practices, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act."[4] Section 10(c), 29 U.S.C. § 160(c).

The prosecuting function under the federal Act is entrusted to the N.L.R.B.'s independent General Counsel, who administers a single statute uniformly in all States (3(d), 29 U.S.C. § 153(d)), and no private suits may be brought under the federal Act, *Amazon Cotton Mills Co.* v. *Textile Workers*, 167 F. 2d 183 (4th Cir.). See also, *Clothing Workers* v. *Richman Bros.*, 348 U.S. 511. On the other hand, administration of these "right-to-work" laws is left to hundreds of local prosecutors, who may pursue such enforcement policies as they like, and to individual litigants.

The severity of state remedies suggests that Congress did not intend to permit their application, for they are totally incongruous with the remedial attitude of the federal Act. For example, if an employer of 100 employees in Tennessee forces a single employee to join a union as a condition of employment, the following remedies are available under state law against the employer and probably the union's agents as well: imprisonment up to one year, criminal fines, actual damages, punitive damages, and an injunction. At the same time, such conduct would also constitute a violation of § 8(a)(3) which, under § 10(c) of the federal Act, would be remedied by a cease and desist order. Contrast these severe state remedies for a single coercive

[4] In appropriate cases, the Board also has discretionary power under § 10(j) of the Labor Act to seek temporary injunctive relief against alleged unfair labor practices pending its administrative determination. There are, of course, no criminal penalties under the federal Act.

incident with the maximum remedies provided by the federal Act if this same employer were to discharge each of his 100 employees for joining a union, a flagrant violation of §§ 8(a)(1) and (3). At most in this latter case the N.L.R.B. would order the employer to reinstate these employees with back pay and to cease and desist his illegal conduct. The employer, for this shocking violation of federal law, would not be imprisoned, not be fined, not be sued for actual or punitive damages, and most likely not even enjoined.

State remedies will invariably overshadow the concurrent federal remedy, if the States are free to apply their own remedies. In most "right-to-work" States, an *ex parte* restraining order can be secured against picketing or a strike allegedly in violation of the state statute before the N.L.R.B. can complete the thorough administrative investigation which it, unlike state courts, must perform before passing on the legality of conduct in the first instance. By comparison to the criminal penalties and civil damages provided for by most of these state laws, the federal remedies pale into insignificance. It seems unlikely, therefore, that Congress would have intended to provide state remedies concurrently with federal remedies, where state remedies would be so different qualitatively from federal remedies.

Such state law diversities in principles, penalties, remedies and administration are inconsistent in a fundamental way with the Labor Act's desideratum of eliminating "the causes of certain substantial obstructions to the free flow of commerce . . . ." Section 1, 29 U.S.C. § 151. If parties to labor relations in interstate commerce are to be subject to the remedies of these twenty state laws, they must exercise extreme caution, for the consequences of violating these laws can be very grave. Needless to say, when collective bargaining is conducted in an atmosphere of fear,

timidity and caution, the parties are not likely to engage in experimentation nor to be flexible in their attitudes. Extreme rigidity in labor relations is precisely the result which is likely to be effectuated if the States are free to apply their own remedies as they like.

Perhaps the most compelling reason to deny the States power to apply their own remedies concurrently to conduct which constitutes a federal unfair labor practice is the real danger of conflicting findings on the same facts. This Court long ago warned that Congress did not intend to permit such concurrent regulation, for the reason that a "multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law." *Garner* v. *Teamsters*, 346 U.S. 485, 490-491.

There is a grave danger of conflicting findings of fact with respect to factually uncomplicated discharges and other kinds of discrimination which would violate both § 8(a)(3) and "right-to-work" laws. The N.L.R.B. could find that an employee had been discharged for just cause, unrelated to his refusal to become a union member, and the N.L.R.B. would dismiss an unfair labor practice complaint. On the other hand, on the identical facts, a state court might find that the discharge was for an illegal object and could send employer and union agents to jail, fine them, grant actual and punitive damages as well as issuing temporary, preliminary and permanent injunctions.

In addition to the inherent danger of conflicting adjudications with respect to the identical facts, there is an even greater danger: It is that state courts might make findings of fact, contrary to facts found by the N.L.R.B., which could result in nullifying protected rights under the federal Act. Suppose that a union calls a strike. An injunction is sought in the state courts on the ground that the strike has an

illegal object of compelling the employer to grant a union shop in violation of the state statute. At the same time, an unfair labor practice charge is filed with the N.L.R.B. alleging that the strike violates §§ 8(b)(2) and (3). If the Board finds—as a matter of fact—that the sole object of the strike is to secure higher wages and that it does not involve union security at all, it follows that the strike is a protected concerted activity under § 7 and is beyond state power altogether. However, while the proceeding is being had before the N.L.R.B., the state court in the meantime finds as a matter of fact that the strike's object is illegal under state law because it seeks to compel the employer to enter into an unlawful contract. How, if at all, could this intolerable conflict be resolved? If the state court has jurisdiction to remedy violations of "right-to-work" laws, this jurisdiction must perforce include the right to make findings of fact as to whether a violation has occurred, which plainly means that the state courts would have power to find facts relating to their own jurisdiction. Even though the N.L.R.B. might make contrary findings of fact, the state court's jurisdiction would still attach by virtue of its own findings of fact. The consequences of such a conflict would permit the States to deprive employees of § 7 rights under the guise of making findings of fact under a state statute. This would work in practice as a kind of reverse preemption doctrine, for on this subject the state courts will almost always find facts to support their jurisdiction. See Cox, Federalism in the Law of Labor Relations, 67 Harv. L. Rev. 1297, 1317.

The issues of fact and law which the state courts would be called upon to make under their "right-to-work" laws, if they have concurrent jurisdiction, are precisely the kinds of issues of fact and law which the N.L.R.B. has regularly been making for years under §§ 8(a)(3) and 8(b)(2). See, e.g., *Radio Officers Union* v. *Labor Board*, 347 U.S. 17. The Labor Board's national point of view, its full-time expertise

qualify it to make such findings. On the other hand, the thousands of county judges who would be called upon to make identical findings under state "right-to-work" laws are more likely to make findings in terms of unrealistic common law standards. They also tend to view legal problems in terms of the social and economic characteristics of the community of which they, usually, are a part. This danger is particularly critical in litigation involving labor relations. *Garner* v. *Teamsters, supra,* 346 U.S. at 490.

Another significant danger of concurrent state remedial jurisdiction is that the state courts will in practice attempt to regulate a myriad of interstate activities over which the States have been ousted of jurisdiction. In other words, we fear that permitting the States to remedy alleged violations of their "right-to-work" laws will serve as an invitation and a temptation to the state courts to regulate all aspects of a controversy which might remotely involve union security. This fear is not academic.

This Court has had three occasions already to reverse state court injunctions against peaceful picketing, issued ostensibly to remedy violations of the "right-to-work" laws of Tennessee, South Dakota, and Georgia. *Electrical Workers* v. *Farnsworth & Chambers,* 353 U.S. 969 (Tennessee); *DeVries* v. *Baumgartner's Elec. Construction Co.,* 359 U.S. 498 (South Dakota); *Local 438, Construction & General Laborers* v. *Curry,* 371 U.S. 542 (Georgia). A great many other state court injunctions against peaceful picketing have also been issued on the basis of "right-to-work" laws. See, e.g., *J. A. Jones Construction Co.* v. *Electrical Workers,* 246 N.C. 481, 98 S.E. 2d 852; *Minor* v. *Building & Construction Trades Council,* 75 N.W. 2d 139 (N.D.); *Olen Department Stores* v. *Retail Clerks,* 39 LRRM 2112 (Miss. Chan. Ct.), which are illustrative only of the *reported* state injunctions against strikes and picketing predicated on alleged violations of "right-to-work" laws.

In many other aspects of labor relations as well, the "right-to-work" state courts have engaged in far-reaching substantive regulation solely by virtue of their jurisdiction to enforce "right-to-work" laws. For example, Louisiana and South Dakota have construed their "right-to-work" laws as prohibiting exclusive bargaining rights, *Piegts* v. *Meat Cutters*, 228 La. 131, 81 So. 2d 835; So. Dakota Attorney General's Opinion, 43 LRRM 73, notwithstanding the fact that § 9 of the federal Act provides that a majority union shall be the "exclusive bargaining representative of all employees in the unit. . . ." A federal court in Arkansas has held that the Arkansas "right-to-work" statute invalidated a collective bargaining contract in its entirety, including a national welfare plan, because of an ostensibly illegal union security clause. *Lewis* v. *Jackson & Squire, Inc.*, 86 F. Supp. 354 (W.D. Ark.), *appeal dismissed* 181 F. 2d 1011 (8th Cir.) *Contra, Lewis* v. *Quality Coal Corp.*, 270 F. 2d 140 (7th Cir.), cert. denied 361 U.S. 929. Alabama has enjoined picketing for the alleged purpose of forcing an employer to bargain about "independent contractors" in violation of that state's "right-to-work" law, *Alabama Highway Express* v. *Local 612, Teamsters*, 108 So. 2d 350 (Ala.), even though the Labor Act entrusts the determination of "employee" or "independent contractor" status to the N.L.R.B. *Labor Board* v. *Hearst Publications*, 322 U.S. 111.

While many other examples might be cited to show how concurrent state court remedial power will inevitably interfere with administration of the Labor Act and implementation of the national labor policy, a recent case is particularly revealing. On December 14, 1961, a Texas court enjoined a union from picketing in support of a demand that an employer enter into an exclusive "hiring hall" contract, the state court reasoning that such a contract demand violated Texas's "right-to-work" law. *Houston Chapter, Associated General Contractors* v. *Hod Carriers, Local 18,*

49 LRRM 2187 (Tex. Dist. Ct.). *A year and a half later,* the N.L.R.B. issued a cease and desist order against this same employer, directing it to bargain in good faith with this same union concerning this same "hiring hall" clause, for the Board said that the state had no power under § 14(b) to prohibit such a clause and that the employer was required to bargain about it at the union's request. *Houston Chapter, Associated General Contractors (Hod Carriers, Local 18),* 143 N.L.R.B. No. 43, 53 L.R.R.M. 1299. Presumably the union is still enjoined from picketing for such a clause in Texas, although the Board has said that the employer must bargain about it. Eventually, of course, this Court might be called on to reverse the Texas courts, but ultimate relief in this Court is years away from the initial entry of a state court injunction.

In order to protect the federal Labor Act from intolerable interference by state courts purportedly acting to remedy violations of their "right-to-work" laws, it is essential that the N.L.R.B.'s remedial power be exclusive.

III. The Legislative History Of § 14(b) Contains No Evidence That Congress Considered and Then Decided To Confer Remedial Jurisdiction On the State Courts For Violations Of "Right-To-Work" Laws.

Congress did not focus on the question of remedies when it enacted § 14(b), for there is no evidence of any Congressional consideration of state remedies. If Congress had any intention of authorizing the States to apply such penalties and remedies as they like on parties to interstate labor relations under § 14(b)—including prison sentences—undoubtedly the Congressional critics of the Taft-Hartley Act would have expressed specific opposition, but the most outspoken critics of Taft-Hartley were as silent on the issue of state remedies as were the proponents of § 14(b). Indeed, there is not a sentence in the entire legislative history of § 14(b) expressing any concern over the deep

conflicts between separate state procedures and remedies to be applied simultaneously with the application of federal remedies under §§ 8(a) and (b), yet surely there would have been serious consideration of these conflicts if Congress had intended to authorize concurrent state remedies.

Although some passages of the legislative history appear to lean one way or another on this question, they do not reveal any true awareness or point of view. The most important factor in the legislative history, we believe, is that it reveals a Congressional desire to permit the States to declare opposition to compulsory membership contracts—nothing more, nothing less. There is not a scintilla of probative evidence that Congress intended to unleash the grave consequences of concurrent state court jurisdiction on labor relations in interstate commerce.

Section 14(b) was written in a Conference Committee. It had no predecessor in the bill which passed the Senate, for the Senate Labor Committee evidently believed that no authorization was necessary to permit the States to prohibit compulsory membership agreements. The Senate report, however, was totally silent on the question of remedies. (Senate Report No. 105 on S. 1126, 1 Leg. Hist. of L.M.R.A. 411-413.)

The House bill, H.R. 3020, however, contained a predecessor to § 14(b). It was § 13 in H.R. 3020, and it provided as follows (1 Leg. Hist. of L.M.R.A. 80-81):

> Sec. 13. Nothing in this Act shall be construed to invalidate any State law or constitutional provision which restricts the right of an employer to make agreements with labor organizations requiring as a condition of employment membership in such labor organization, and all such agreements, insofar as they purport to impose such requirements contrary to the provisions of the law or constitution of any State, are hereby divested of their character as a subject of regulation by Congress under its power to regulate commerce among

> the several States and with foreign nations, to the extent that such agreements shall, in addition to being subject to any applicable preventive provisions of this Act, be subject to the operation and effect of such State laws and constitutional provisions as well.

The meaning of this section is far from clear, for it appears simultaneously to strip union security contracts as a subject of Congressional concern and to make such contracts subject to the "preventive provisions" of both the federal and state laws. It appears, however, to intend at least some kind of concurrent jurisdiction to be exercised by the States, and the main House report—House Report No. 245 on H.R. 3020—speaks of the "concurrent" power granted by the States under this § 13 in several places. House Report No. 245 on H.R. 3020, 1 Leg. Hist. of L.M.R.A. 325, 331 and 335.

The debates in the House reveal very little on this subject, for the critics of § 13 said that union security was a good thing and the proponents said union security was bad. The only exchange which comes near the present issue is this, and it, too, focuses on another problem (1 Leg. Hist. of L.M.R.A. 748):

> MR. BARDEN. It [§ 13] is dealing with a very technical question of regulating commerce between the several States, and in view of the fact that many of the States have passed laws dealing with the closed shop, why, then, the committee felt, and I am sure the whole House will feel, that the States should be recognized and their laws should certainly be given full power and effect as far as a State is concerned.
>
> • • •
>
> MR. JENNINGS. Does it not in effect mean this, and is it not designed to have this effect, that insofar as this House or the Congress may, it concedes the right of the several States to pass legislation or laws such as have been passed by certain States.

MR. BARDEN. The gentleman is exactly correct.

MR. HOFFMAN. . . . I stated in my opening statement that I understood what the committee was trying to get at, which was to give permission to the States to legislate on interstate commerce insofar as it affected these contracts. But what I want to know is whether this section does it. If you say so, I will have to go along with you.

MR. BARDEN. Well, I say so.

There was no debate on this issue in the Senate until after the Conference Bill was reported.

When the Conference Committee adopted the language of present § 14(b), it necessarily rejected the language of § 13 of H.R. 3020. Why the Conference Committee preferred present § 14(b) to § 13 of H.R. 3020 is nowhere explained explicitly. The changes, however, are evidently significant: (1) The Conference deleted the provision of the House section which would have stripped union security agreements of their character as a subject of Congressional regulation, thereby making clear that it was a subject of Congressional regulation; and (2) The Conference deleted the provision of the House section which would expressly have subjected union security contracts to "the operation and effect of such State laws and constitutional provisions." That these changes were more than stylistic, but were deliberate and substantive, is evident both from the extensiveness of the changes and from a statement by Senator Ball, a Senate conferee, that the language of § 14(b) was the result of a "compromise" (2 Leg. Hist. of L.M.R.A. 1546):

MR. MAGNUSON. How much new matter was put into the bill in conference?

• • •

MR. BALL. I think the question of State contracts was one; that is, making union contracts as a condition

of employment. I think that is new. *There was a compromise in the House on language spelling it out.* (Emphasis added.)

There are several statements in the legislative history that § 14(b) of the conference bill was intended to have the "same effect" as § 13 of H.R. 3020. See House Conference Report No. 510 on H.R. 3020 at p. 60, 1 Leg. Hist. 564; Statement of House Managers on H.R. 3020, 2 Leg. Hist. 1619; and Statement of Senator Taft, 2 Leg. Hist. of LMRA 1543. It might be argued that these statements show that the change of language from § 13 of H.R. 3020 to § 14 of the conference bill was not a change of substance. While § 14(b) has the "same effect" as § 13 of H.R. 3020 in the sense that it too authorizes the States to declare a prohibition against compulsory membership contracts, § 14(b) does not have the same effect in the critical sense here that § 14(b) contains none of the language of § 13 which seemed to authorize state remedial jurisdiction.

Much more important than finding historical clues to the Congressional intention on a specific and technical subject which might not have occurred to Congress is this: What was Congress' dominant object in enacting § 14(b)? The 1947 Congress simply wanted to let the individual States declare whether their citizens could be required to join a union involuntarily, and they wanted to make sure that § 8(a)(3) could not be interpreted to upset this result. In other words, the prevailing mood of the 1947 Congress was to let the States establish the federal policy as to their citizens on the question of compulsory union membership, whether in favor of or against compulsory membership.

Since, as we have explained above, Congress intended to make violation of a "right-to-work" law enacted under § 14(b) a federal unfair labor practice, it is quite natural perhaps that there was no discussion of separate state remedies, for none would have been intended to remedy a

federal unfair labor practice. Congress' silence on the question of remedies seems more probably explained on this basis than on the basis that Congress silently intended to permit the States to fashion any remedies they like to be applied as they like to labor relations in commerce.

Given that Congress wanted to let the States declare the substantive policy for their citizens on the subject of compulsory union membership contracts, where is the evidence to show that Congress intended to authorize concurrent state jurisdiction along with the N.L.R.B., notwithstanding the serious dangers of interference with the national labor policy discussed above? Congress' purpose would be fully and wisely fulfilled by exclusive N.L.R.B. jurisdiction for remedial purposes, absorbing state policy into the federal labor policy whether state policy permits *or* prohibits compulsory membership contracts.

IV. This Court's Decisions Following Algoma Plywood Point To Exclusive Federal Jurisdiction To Remedy All Unfair Labor Practices.

In its direction of reargument, the Court inquired as to the scope and vitality of *Algoma Plywood & Veneer Co.* v. *Wisconsin Employment Relations Board*, 336 U.S. 301. In *Algoma* the Court, under the Wagner Act, sustained state court jurisdiction to remedy the discharge of an employee under a "maintenance of membership" contract which violated a Wisconsin statute. The state statute required secret ballot approval by two-thirds of the affected employees as a prerequisite to the execution of such a contract.

Algoma arose under the Wagner Act, but it did not reach judgment until after passage of the Taft-Hartley Act. The Court's exact holding was that § 8(3) of the Wagner Act, 49 Stat. 452, 29 U.S.C. § 158(3), did not deprive the States of power to regulate union security contracts, for that

former section "merely disclaims a national policy hostile to the closed shop or other forms of union-security agreement." *Id.* at 307. Although the Court considered the potential implications of the Taft-Hartley Act, its discussion of § 14(b) appears to be *dicta*.

The Court examined the Taft-Hartley Act to see whether "it expresses a policy inconsistent with . . ." the Wisconsin law which would prevent its enforcement. *Id.* at 313. The Court, concluding that it did not, said, *id.* at 313-314:

> Other provisions of the Taft-Hartley Act make it even clearer than the National Labor Relations Act that the States are left free to pursue their own more restrictive policies in the matter of union security agreements. Because § 8(3) [sic] of the new Act forbids the closed shop and strictly regulates the conditions under which a union-shop agreement may be entered, § 14(b) was included to forestall the inference that federal policy was to be exclusive.

The two critical questions in this reargument were not considered at all by the Court in *Algoma*: Is execution of a union membership contract in a "right-to-work" state a federal unfair labor practice? If so, is the federal remedy exclusive? Because the employee discharge in *Algoma* occurred *before* enactment of present §§ 7, 8(a)(3), and 14(b), it could not have constituted a federal unfair labor practice under those sections, for violation of a state law was not an unfair labor practice under the Wagner Act. In *Algoma* the question was whether a state may forbid what § 8(3) of the Wagner Act permitted (336 U.S. at 307), whereas here the question is whether a state may remedy a violation of a state law which is also a federal unfair labor practice.

Assuming the correctness of the foregoing analysis, *Algoma* is no barrier whatsoever to the Court's deciding

here that federal remedies are exclusive for violations of "right-to-work" laws which also constitute unfair labor practices. However *Algoma's* scope is interpreted, its vitality has been wholly undermined by the subsequently developed preemption doctrine.

Several years after the Court's *Algoma* decision, and beginning with *Garner* v. *Teamsters*, 346 U.S. 485, the doctrine of federal preemption of interstate labor relations has been developed in a body of strong precedents. The classical expression of the need for the preemption was stated by Justice Jackson in *Garner, id.*, at 490-491:

> A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law.

The Court summarized the doctrine very succinctly in its next significant preemption precedent, *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468, 475: "A State may not enjoin under its own labor statute conduct which has been made an 'unfair labor practice' under the federal statutes."

In the decade following *Garner*, the Court has systematically stricken state court assertions of jurisdiction over conduct arguably subject to the N.L.R.B.'s regulatory power—regardless of the state statute or state policy relied upon to support state jurisdiction.

In three leading and important cases, the Court has reversed state court injunctions based on "right-to-work" statutes where the state courts had found that the object of picketing was to compel violations of state law. *Electrical Workers, Local 429* v. *Farnsworth & Chambers*, 353 U.S. 969; *DeVries* v. *Baumgartner's Elec. Construction Co.*, 359 U.S. 498; *Local 438, Construction & General Laborers* v. *Curry*, 371 U.S. 542. These precedents are apposite here, for in those cases the conduct was arguably subject to regula-

tion by the N.L.R.B., whereas here execution of the contract in question violated employees' § 7 rights under § 8(a)(3) and was subject to regulation by the N.L.R.B.

It seems possible that *sub silentio* the Court decided the present question in *Farnsworth & Chambers, DeVries* and *Curry, supra*; for the issue at bar lurked in each of them. Those cases cannot be distinguished from this case solely because they involved picketing and this does not. If picketing were the critical distinction in those cases, the result would be this: The States have no jurisdiction to regulate picketing to secure a union security contract, but, if such a contract is actually executed as a result of picketing, the States may regulate the execution in any way they like. Moreover, in the *Curry* case, *supra*, the Court assumed that the state court's finding of an illegal object as a matter of state law was correct, but still found no state court jurisdiction. The preemption doctrine is not limited to picketing cases, but it applies similarly to state efforts to regulate the substantive terms of collective bargaining agreements. *Teamsters, Local 24* v. *Oliver*, 358 U.S. 283.

In addition to these three preemption cases, involving state court reliance on "right-to-work" laws as the basis for attempted regulation of labor relations in commerce, there are many other cases in which a variety of state law grounds—statutory and judicial policy—were asserted as a basis for state court jurisdiction. In each case this Court reversed on preemption grounds.

> *Plankington Packing Co.* v. *Wisconsin Employment Relations Board*, 338 U.S. 953, invalidated Wisconsin's regulation based on union security statute—the same statute involved in *Algoma*.
>
> *Amalgamated Association* v. *Wisconsin Employment Relations Board*, 340 U.S. 383, invalidated Wisconsin's regulation based on a statute prohibiting strikes against utilities.

Bldg. Trades Council v. *Kinard Construction Co.*, 346 U.S. 933, invalidated Alabama's regulation based on common law policy to protect employees from being coerced into joining a union by picketing of their employer.

Weber v. *Anheuser-Busch, Inc.*, 348 U.S. 468, invalidated Missouri's regulation based on a restraint of trade statute.

General Drivers v. *American Tobacco Co.*, 348 U.S. 978, invalidated Kentucky's regulation based on statutory and common law policy requiring common carriers and their employees to serve all persons.

Local 25, Teamsters v. *New York, New Haven & Hartford R. Co.*, 350 U.S. 155, invalidated Massachusetts' regulation based on a statute prohibiting secondary boycotts against railroads.

United Mine Workers v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, invalidated Louisiana's regulation based on state policy prohibiting picketing by unions which had not complied with the former provisions of the federal Act requiring non-communist affidavits in certain cases.

Guss v. *Utah*, 353 U.S. 1, invalidated Utah's regulation based on labor relations statute where N.L.R.B. had refused to exercise its power over parties.

Meat Cutters, Local 427 v. *Fairlawn Meats*, 353 U.S. 20, invalidated Ohio's regulation based on state common law policy against picketing to coerce an employer to coerce his employees to join a union.

Youngdahl v. *Rainfair, Inc.*, 355 U.S. 131, invalidated Arkansas' regulation based on state policy prohibiting all picketing where any picketing has been violent.

Hotel Employees, Local 255 v. *Sax Enterprises, Inc.*, 358 U.S. 270, invalidated Florida's regulation based on judicial policies against picketing.

Teamsters, Local 24 v. *Oliver*, 358 U.S. 283, invalidated Ohio's regulation based on antitrust statute and policy.

San Diego Bldg. Trades Council v. *Garmon*, 359 U.S. 236, invalidated California's regulation based on common law tort policies.

Plumbers & Steamfitters, Local 298 v. *County of Door*, 359 U.S. 354, invalidated Wisconsin's regulation based on statute prohibiting picketing to coerce employees to join union.

In re Green, 369 U.S. 689, invalidated Ohio's regulation based on common law contempt of court powers.

Marine Engineers v. *Interlake S.S. Co.*, 370 U.S. 173, invalidated regulation based on Minnesota's statute prohibiting minority union picketing for a union shop contract.

Waxman v. *Virginia*, 371 U.S. 4, invalidated Virginia's regulation based on statute prohibiting non-employees from picketing during strike.

Plumbers, Local 100 v. *Borden*, 373 U.S. 690, invalidated Texas' regulation based on common law tort policy.

Iron Workers v. *Perko*, 376 U.S. 701, invalidated Ohio's regulation based on common law tort policy.

Motor Coach Employees v. *Missouri*, 374 U.S. 74, invalidated Missouri's regulation based on statute authorizing seizure of utilities and prohibiting strikes thereafter.

The plain thrust of these cases has been that state regulation of activities in interstate commerce—whatever the alleged jurisdictional predicate—must fall when such activities are subject to the N.L.R.B.'s regulation. The lesson of these cases for the case at bar is self-evident. Since *Algoma* preceded these cases, *Algoma* would not bar preemption of remedies now.

CONCLUSION

For the reasons stated, the N.L.R.B.'s jurisdiction to remedy unfair labor practices in commerce must be exclusive in this case for the same reason that it has been held exclusive in other cases of attempted state regulation, *i.e.*, to avoid intolerable conflicts of policy and procedure. In the absence of a clear Congressional intention to permit the States to apply their divergent remedies to parties in commerce based on the States' own findings of fact, state regulation should fall.

The judgment of the Florida Supreme Court should be reversed.

Respectfully submitted,

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August, 1963.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

NO. 13

RETAIL CLERKS INTERNATIONAL ASSOCIATION LOCAL 1625, AFL-CIO, ET AL., *Petitioners*

v.

ALBERTA SCHERMERHORN, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

INTEREST OF THE AFL-CIO

This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

The AFL-CIO is a federation of labor unions whose total membership is approximately thirteen million. As the principal spokesman for the organized working people of this country, the Federation is vitally interested in the permissible substantive reach and the mode of enforcement of state laws, enacted pursuant to the authorization in section 14(b) of the National Labor Relations Act, prohibiting agreements requiring union membership or its practical equivalent as a condition of employment.

Petitioners have fully covered the legal arguments supporting their position that the National Labor Relations

Board has exclusive jurisdiction to enforce such substantive state prohibitions. We endorse that position, and there is no need for us to burden the Court with a repetition of petitioners' thorough presentation. We will confine ourselves for the most part to a brief statement of the practical policy reasons why removal of the states' criminal, injunctive, and other enforcement apparatus from the whole area of union security in interstate commerce is essential if there is to be avoided the danger of state interference with national labor policy.

ARGUMENT

I. Sections 8(a)(3) And 14(b) Of The National Labor Relations Act Make Violations Of Valid State "Right-To-Work" Laws Unfair Labor Practices, Subject To The Exclusive Jurisdiction Of The NLRB.

To put our subsequent policy argument in proper perspective, we will sketch in barest outline our understanding of the way in which sections 8(a)(3) and 14(b) of the National Labor Relations Act make violations of valid state "right-to-work" laws unfair labor practices, subject to the exclusive jurisdiction of the NLRB.

1. Only an express proviso to section 8(a)(3) prevents agreements conditioning employment on union membership, or its practical equivalent, from being unfair labor practices as a matter of federal law. *NLRB* v. *General Motors Corp.*, 373 U.S. 734; *Retail Clerks Local 1625* v. *Schermerhorn*, 373 U.S. 746, 756. Section 14(b) then expressly declares that "[*n*]*othing* in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization" in any state prohibiting such agreements. (Emphasis added.) Section 14(b) obviously refers to the proviso in section 8(a)(3).

Accordingly, in right-to-work states the authorization granted by the proviso for membership agreements is nullified. The general prohibitory language of section 8(a)(3) thus becomes operative, making membership agreements in right-to-work states unfair labor practices as a matter of federal law.

2. Subject to qualifications not relevant here,[1] this Court has laid down the definitive preemption rule as follows: "When an activity is arguably subject to §7 or §8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board." *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 245. As we have indicated, the execution or application of agreements requiring union membership, in violation of valid state right-to-work laws, seems plainly subject, not just "arguably" subject, to the prohibition of section 8(a)(3), through the operation of section 14(b) in canceling the proviso's permission for such agreements. It follows, under the *Garmon* doctrine, that such agreements are subject to the exclusive jurisdiction of the NLRB, and that state courts or other enforcement agencies are ousted of jurisdiction.

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[1] Despite the presence of activities potentially subject to the NLRA, states retain the power to regulate as a matter of their own state law (1) conduct of "merely peripheral concern" to the federal Act, and (2) conduct "marked by violence and imminent threats to the public order." *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 244-45, 247; *Machinists* v. *Gonzales*, 356 U.S. 617; *Automobile Workers* v. *Russell*, 356 U.S. 634. In addition, the doctrine of primary jurisdiction does not prevent either a federal or state court from assuming jurisdiction over a suit under sec. 301 of the Taft-Hartley Act on a collective contract between a union and an employer, even though an unfair labor practice is also involved. *Smith* v. *Evening News Assn.*, 371 U.S. 195. No one suggests that any of these exceptions to or qualifications of the preemption doctrine are applicable in the instant case.

3. This conclusion is supported by legislative history and by the logic of prior decisions of this Court. The Hartley bill, H.R. 3020, 80th Cong., 1st Sess., as it passed the House and went to conference, contained in section 13 an express provision that agreements conditioning employment on union membership would be "divested of their character as a subject of regulation by Congress" to the extent that such agreements would be subject to the "operation and effect" of state laws restricting their execution. This unmistakable anti-preemption language was expunged in conference. In its stead was substituted the present section 14(b), which by its express terms does no more than allow the states to revoke the permission for membership agreements granted by the proviso to section 8(a)(3).

A fair interpretation of previous decisions by this Court is that state courts must defer to the exclusive competence of the NLRB to deal with arrangements or attempts at arrangements which may amount to closed shops, prohibited by section 8(a)(3) without regard to state law. See *IBEW Local 429* v. *Farnsworth & Chambers Co.*, 353 U.S. 969; *DeVries* v. *Baumgartner's Electric Construction Co.*, 359 U.S. 498; *Laborers Local 438* v. *Curry*, 371 U.S. 542. A highly anomalous situation would exist if state courts could nevertheless enforce state substantive prohibitions of union shop or agency shop arrangements. A union and employer establishing a relatively limited union shop or agency shop would face the full arsenal of state court injunctions, damages, and possible criminal sanctions. But a union and employer going all the way and creating an outright closed shop would have nothing to fear but a Labor Board remedial order. Surely such a result cannot be countenanced. The thrust of this Court's decisions regarding closed shops must be extended to cover union shops and agency shops.

Once it is recognized that a union shop or agency shop agreement is an unfair labor practice under section 8(a)(3) in states forbidding such an arrangement, it is of course no argument for concurrent state court jurisdiction to say that there is no danger of conflict between federal and state laws because their substantive prohibitions are the same. This Court laid that argument to rest as long ago as *Garner v. Teamsters Local 776*, 346 U.S. 485, 490-91, when it said: "... multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law."

II. Exclusive NLRB Jurisdiction Over Conduct Made An Unfair Labor Practice By The Substantive Prohibitions Of State "Right-To-Work" Laws Is Necessary To Prevent State Interference With National Labor Policy.

As we have shown, there seems no legal reason why the Labor Board should not have exclusive jurisdiction over conduct made an unfair labor practice by the interaction of sections 8(a)(3) and 14(b) of the Act and the substantive prohibitions of state "right-to-work" laws, just as it has exclusive jurisdiction over conduct made an unfair labor practice by section 8(a)(3) directly. The practical need to prevent state interference with national labor policy reinforces this view. Exclusion of all state enforcement is necessary because it is the only feasible way (1) to keep the states from grossly abusing the limited *substantive* powers allowed them under section 14(b); (2) to eliminate rigorous state remedies whose nature is wholly incompatible with enlightened labor relations; and (3) to ensure a reasonably smooth and efficient administration of the Act.

The inevitable tendency of the states, in the enactment and enforcement of right-to-work laws, is to overstep the narrow boundaries allotted them by section 14(b), and to attempt the regulation of conduct clearly beyond their

reach. Thus, the Wyoming statute by its terms, and the South Carolina and Arkansas statutes through interpretation, purport to outlaw the exclusive hiring hall. Wyo. Laws 1963, c. 39, §5; *Branham* v. *Miller Electric Co.*, 237 So. Car. 540, 118 S.E. 2d 167 (1961); *Kaiser* v. *Price-Fewell*, 359 S.W. 2d 449 (Ark. Sup. Ct. June 4, 1962). Yet nondiscriminatory exclusive hiring halls are lawful under federal law, *Teamsters Local 357* v. *NLRB*, 365 U.S. 667, and the Labor Board has recently ruled that they are not a form of union security subject to state regulation under 14(b), *Houston Chapter, Associated General Contractors*, 143 NLRB No. 43, 53 LRRM 1299, 1963-1 CCH NLRB ¶12,427 (June 28, 1963). Iowa has used its right-to-work law to regulate the check-off. See [1956] *Iowa Atty. Gen. Op.* 188, Sept. 16, 1955, 1 CCH LRR-State Laws, Iowa ¶46,565.45. Louisiana, South Dakota, and Wyoming have taken the ultimate step of interpreting their right-to-work provisions as forbidding unions from being the exclusive bargaining representatives in units containing dissenting employees. *Piegts* v. *Meat Cutters Local 437*, 228 La. 131, 81 So. 2d 835 (1955); [1957-58] *So. Dak. Atty. Gen. Op.* 236, Sept. 3, 1958, 43 LRRM 73 (1959); *Wyo. Atty. Gen. Op.*, April 25, 1963, p. 4 (mimeo. copy). And of course this Court on several occasions has had to strike down state court assertions of jurisdiction, under the ostensible authority of right-to-work laws, over picketing and other activity arguably subject to regulation under the NLRA. See *IBEW Local 439* v. *Farnsworth & Chambers Co.*, 353 U.S. 969; *DeVries* v. *Baumgartner's Electric Construction Co.*, 359 U.S. 498; *Laborers Local 438* v. *Curry*, 371 U.S. 542.

The lesson is clear. Allowing the states to enforce the provisions of their right-to-work statutes creates entirely too inviting a vista. They will not only enforce the substantive prohibitions which section 14(b) authorizes; they will

enforce provisions which the section plainly does not authorize. The only way to be sure of being understood by all the county judges is to lay down an absolute rule that they have no power to entertain jurisdiction at all, regardless of whether the subject matter is one which section 14(b) gives the state the substantive power to prohibit.

It is no answer to say that this Court retains the power to redress state court excesses in the exercise of jurisdiction. Labor injunctions, to cite one typical state remedy, are not like other injunctions. Dissolution of such an injunction on appeal two years after its issuance does not restore the status quo ante. In the meantime the strike has died. See, *e.g.*, Frankfurter and Greene, *The Labor Injunction* 201 (1930) ("the suspension of strike activities, even temporarily, may defeat the strike for practical purposes and foredoom its resumption, even if the injunction is later lifted").

By now there has been enough experience with right-to-work laws for us to be able to assert with conviction that if the state courts are left any enforcement power, they will abuse it by asserting jurisdiction far beyond the substantive limits allowed them by section 14(b). We think this is a powerful practical argument why, in order to ensure the inviolability of federal labor policy, they should be divested of jurisdiction entirely.

Even if the state courts should be scrupulous in observing the limits of substantive power granted by section 14(b), however, the mere application of the usual state remedies would introduce a harsh and jarring note into the scheme of labor relations contemplated by the federal law. The essence of the federal system is that the "difficult and delicate responsibility" of balancing "conflicting legitimate interests" in the labor relations field should be entrusted in

the first instance to the special competence of an administrative agency, "subject to limited judicial review," and that the orders of that agency should be remedial and not punitive. *NLRB* v. *Teamsters Local 449*, 353 U.S. 87, 96; *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221; *Carpenters Local 60* v. *NLRB*, 365 U.S. 651, 655. In sharp contrast, twelve of the twenty-one states now having right-to-work statutes try to subject union security agreements to the blunt and undiscriminating processes of the criminal law.[2] Injunctive relief, obtainable directly by private litigants under varying conditions in the various states, is of course also generally provided. This is no way to regulate labor relations. Congress saw fit to let the states exercise a veto power over the federal permission for union membership agreements. But that limited prerogative should not be transformed into a license to trundle in the whole vast, inappropriate state enforcement machinery of fines, jail sentences, hasty injunctions, punitive damages, and whatever else can be put together as a means of implementing local hostility toward the concept of union security.

Exclusive Labor Board jurisdiction is also essential in order to avoid unduly cumbersome administrative procedures. We assume that at the very least "the assessment of any union-security arrangement for the purposes of §§7, 8 and 14(b), when there is significant doubt about the matter, is initially a task for the Board," and that the state courts are ousted of jurisdiction over such doubtful cases. See *Retail Clerks Local 1625* v. *Schermerhorn*, 373 U.S. 746, 755. In all likelihood, most future cases will fall into this doubtful category. Unions will be experimenting with union security arrangements hopefully beyond the reach of the sub

[2] Arkansas, Georgia, Indiana, Iowa, Nebraska, Nevada, South Carolina, South Dakota, Tennessee, Utah, Virginia, and Wyoming.

stantive power of the states under section 14(b); it would be fruitless for unions to cling to clauses plainly unlawful. Yet if past experience, as exemplified by this very case, is any guide, many state courts can be expected to assert jurisdiction in every type of union security case, provided they are left with jurisdiction over any type. Absent a blanket rule of exclusive Board jurisdiction, the following pattern is likely to emerge: a state court will issue an injunction, which will be vacated a year or so later in a per curiam order by this Court; the union security arrangement will next be presented to the NLRB for a determination of its status as a matter of federal law; if the arrangement is found subject to state proscription under section 14(b), the case will then return to the state court for a state remedy in still a *third* proceeding. So wasteful and protracted a process flies right in the face of the key federal policy of promoting the swift resolution of labor disputes.[3]

As far as substantive legal analysis is concerned, the first round of state litigation in the instance just described would be an exercise in futility, and the result of the second round would be a foregone conclusion. The only meaningful disputation would take place before the Labor Board. This, too, confirms the soundness of having the Labor Board proceeding the only proceeding.

III. If Exclusive NLRB Jurisdiction Is Not Accepted, Both Law And Policy Establish Exclusive State Jurisdiction, Not Concurrent State And NLRB Jurisdiction, As The Only Sensible Alternative.

[3] See, *e.g.*, the statement of Chairman Frank W. McCulloch of the NLRB before the United States Senate Subcommittee on Administrative Practice and Procedure: "The notorious and chronic problem of delay is the source of greatest aggravation to the Board. It is by all odds the ground for most of the criticism and complaints against the Board." Quoted in *NLRB Twenty-Sixth Annual Report* 5 (1962).

The legal and policy considerations we have set forth justify the conclusion that the NLRB has exclusive jurisdiction over union shop and agency shop arrangements made unfair labor practices through the operation of section 14(b) and state right-to-work laws, and that the state courts have no jurisdiction to remedy such unfair labor practices. However, if the Court should hold that the state courts do have jurisdiction over union shop and agency shop arrangements violative of state substantive law, we think it would then have to follow that state court jurisdiction becomes exclusive. The notion that the state courts and the Labor Board could exercise concurrent jurisdiction in this area seems to us the least logical of all the alternatives as a matter of legal theory, and the least desirable as a matter of practical policy.

Why might this Court decide that state courts have jurisdiction to enforce right-to-work laws outlawing union shops and agency shops? We can only conclude that it would be because the Court was left unconvinced that the effect of state right-to-work laws is to make such arrangements unfair labor practices as a matter of federal law. It could hardly be because the Court felt that such arrangements, although made federal unfair practices, were still left subject to state remedial processes. The latter rationale would seem contrary to everything that has been taught about preemption since *Garner* and *Garmon*. And it would also seem contrary to the decisions establishing the preempted status of efforts to secure a closed shop illegal under section 8(a)(3). See *IBEW Local 429* v. *Farnsworth & Chambers Co.*, 353 U.S. 969; *DeVries* v. *Baumgartner's Electric Construction Co.*, 359 U.S. 498; *Laborers Local 438* v. *Curry*, 371 U.S. 542. State enforcement jurisdiction over union shops and agency shops is thus dependent on their not being illegal under section 8(a)(3). Accordingly, if the state

courts are found to have jurisdiction, it must be on the ground the NLRB has none.

In practice, the existence of two forums, each with its own set of remedies, could be disastrous. Once concurrent jurisdiction is upheld, there would appear no way of assuring uniformity of administration. To obtain relief against a single discriminatory arrangement, one group of employees could go to the Labor Board and another group to a state court. Different evidence could be adduced in the different forums. Different fact-finders could evaluate even the same evidence differently. The Labor Board as a public agency might arrange a satisfactory settlement of the dispute, but the private litigants in the state action might press on with their suit. There is no need to prolong the recital. This Court fully appreciated the point in *Garner* v. *Teamsters Local 776*, 346 U.S. 485, 498-99, where it said simply: "The conflict lies in remedies, not rights. ***when two separate remedies are brought to bear on the same activity, a conflict is imminent."

We call one final item to the Court's attention. If the Court holds, as we have urged, that the state court here has no jurisdiction to provide a remedy, the reason obviously must be that the exclusive jurisdiction to provide a remedy lies with the NLRB. The Court's decision would thus necessarily resolve the jurisdictional status of both the state courts and the Labor Board. As we have said, should the Court conclude instead that the state court does have enforcement jurisdiction, we think the proper rationale would be that there was no federal unfair labor practice involved, and hence no NLRB jurisdiction. Technically, however, a decision that the Board lacks jurisdiction is not necessary to a holding that the state court possesses it. At least conceptually, the existence of state enforcement juris-

diction is consistent either with the theory that the Board has no jurisdiction, or with the theory that the Board has jurisdiction but, for some reason not yet explained, the usual preemption rules do not apply to divest the states of jurisdiction. Accordingly, if the Court upholds state jurisdiction, and yet remains dubious about the rationale that state and Board jurisdiction are here mutually exclusive, we earnestly submit that the Court as a minimum precaution should refrain from any affirmative pronouncements that the NLRB may exercise concurrent jurisdiction. Strong dictum might encumber the Court when the question of Labor Board jurisdiction is squarely presented in a case arising from an actual Board proceeding. We feel that if the present litigation leaves the Court with any doubts about the matter, a concrete situation in which both a state court and the NLRB were attempting to assert concurrent jurisdiction over a union shop or agency shop arrangement would demonstrate beyond question the utter impracticality of such a system of enforcement. State enforcement jurisdiction by itself would be bad enough. Concurrent state and Labor Board jurisdiction would compound the evil.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the brief for petitioners, the judgment of the court below should be reversed.

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 13

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL 1625, AFL–CIO, ET AL., PETITIONERS

v.

ALBERTA SCHERMERHORN, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted pursuant to the Court's order of June 3, 1963, inviting the Solicitor General to file a brief expressing the views of the Government.

QUESTION PRESENTED

Whether State courts have jurisdiction to enjoin the enforcement of an agency shop contract that violates a State law applicable to such contracts by virtue of Section 14(b) of the National Labor Relations Act.

STATEMENT

Retail Clerks Local 1625 is the certified collective bargaining representative of several thousand employ-

ees of Food Fair Stores, Inc., in five Florida counties (R. 2, 13). Food Fair is a large interstate retail food store chain, over which the Board has regularly asserted jurisdiction. In October 1960, the Union and Food Fair negotiated a collective bargaining agreement containing an "agency shop" clause, which provided that employees covered by the contract who might choose not to join the Union "shall be required to pay as a condition of employment, an initial service fee and monthly service fees" to the Union. (R. 13, Art. 19, Sec. 2, p. 16.)[1] In November 1960, four non-union employees in the bargaining unit brought suit in the Florida Circuit Court for Dade County seeking (i) a declaration that the agency shop clause was illegal, (ii) an injunction preventing Food Fair and the Union from requiring them or other employees covered by the agreement to pay money under that clause, and (iii) an accounting (R. 5–6). It was alleged that the agency shop clause violated Section 12 of the Declaration of Rights of the Florida Constitution which provides in part that, "The right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union, or labor organization * * *" (R. 4).

The trial court held that the agency shop clause did not violate the Florida Constitution and dismissed

[1] The clause states that these fees are to be paid "for the purpose of aiding the Union in defraying costs in connection with its legal obligations and responsibilities as the exclusive bargaining agent of the employees in the appropriate bargaining unit" (R. 13, Art. 19, Sec. 2, p. 16).

the complaint (R. 14–15). On direct appeal, the Florida Supreme Court reversed, ruling that the agency shop clause violated the Florida Constitution (R. 19–31). The Court further held that since the agency shop was a form of union security within the scope of Section 14(b) of the National Labor Relations Act, the State courts had jurisdiction to afford a remedy for the violation of State law (R. 24).

This Court granted certiorari and set the case down for argument following *National Labor Relations Board* v. *General Motors Corporation* (371 U.S. 908). In *General Motors*, 373 U.S. 734, the Court held that the agency shop is a form of union security permitted by the proviso to Section 8(a)(3) of the Act, at least where it is valid under State law. In the instant case, the Court held that the agency shop is also a form of union security that the States may prohibit under Section 14(b). The Court reserved decision upon the question of (pp. 747–748) "whether the Florida courts, rather than solely the National Labor Relations Board, are tribunals with jurisdiction to enforce the State's prohibition against such arrangements." The Court then set the case down for reargument, and invited the Solicitor General to file a brief expressing the views of the Government. 373 U.S. 746.

SUMMARY OF ARGUMENT

I

A. (1) The words of Section 14(b) strongly favor the view that the States have power to enforce, and

not merely to enact, right-to-work prohibitions. The interpretation of Section 14(b) proposed by petitioner—that a State may enact substantive law prohibiting union security contracts but may not implement its own law—would be a unique and unprecedented division of State and federal authority. So radical an innovation would surely have drawn more attention in the Congressional debates and have been more clearly expressed in the statute.

(2) The legislative history of Section 8(3) of the original Wagner Act and Sections 8(a) (3) and 14(b) of the Taft-Hartley Act shows beyond peradventure that Congress intended to leave the States free to exercise full concurrent jurisdiction over union security agreements. The Senate Report on Section 8(3), and the comments of Senator Wagner and others on the floor, make plain that the proviso to Section 8(3) left unaffected the States' pre-existing power to enact and enforce prohibitions upon the closed shop and other forms of union security. On the eve of the Taft-Hartley Act, 12 States had enacted "right-to-work laws" enforcible by a variety of sanctions—injunctions, damage suits, criminal fines, and imprisonment. Congress was thoroughly informed about these laws during the Taft-Hartley debates; and the committee reports, as well as statements on the floor by Senator Taft and Representative Hartley, unmistakeably demonstrate that Con-

gress intended to preserve to the States all powers, remedial as well as substantive, which they had hitherto exercised. The sole purpose of Section 14(b) was to dispel any possible inference that Congress, by prohibiting the closed shop and regulating the union shop, had thereby limited the traditional role of the States.

There was no contemporaneous doubt about the intent and effect of Section 14(b). Less than two years after its enactment, the Court, in *Algoma Plywood Co.* v. *Wisconsin Employment Relations Board*, 336 U.S. 301, held that under Section 14(b) the States had jurisdiction to enact and enforce laws prohibiting union security agreements. Contemporaneous commentators all expressed the view that Section 14(b) was intended to avoid ousting the States of jurisdiction over union security agreements. In the ensuing nationwide debate over right-to-work laws, we have never seen it suggested that the States have no power to enforce their own laws because the National Labor Relations Board is charged with that function.

B. (1) To recognize State jurisdiction to enjoin, redress, or punish the "execution or application" of contracts requiring union membership as a condition of employment will not interfere with the exercise of the federal right to engage in strikes, picketing or other concerted activities. Plainly, the power of the States does not extend to adjudicating disputes over union organization or representation merely because there is a claim and perhaps some evidence that the

ultimate, though remote and uncertain, objective of the union's picketing was to secure the employment of union labor. *Local Union 438, Construction & General Laborers' Union* v. *Curry*, 371 U.S. 542; *Local Union 429, Electrical Workers* v. *Farnsworth and Chambers Co.*, 353 U.S. 969. Indeed, it is arguable that the States have no jurisdiction over peaceful strikes and picketing under any circumstances, but are limited to applying sanctions against the actual execution of union-security contracts and discharges thereunder. But wherever the precise line be drawn, the opportunities for separating State jurisdiction over the execution and application of the forbidden agreements from the exclusive Board jurisdiction over concerted activities protected by Section 7 are more than adequate to show that State power in the former instance carries no serious threat to implementation of national labor policies in the latter.

(2) Nor will the framing of divergent State remedies for the "execution or application" of a union security contract in violation of State law interfere with the national labor policy. The exclusivity of the Board's jurisdiction, including the exclusivity of its remedial powers, rests upon the need for ensuring that the substantive rules laid down by Congress are given uniform application. *Garner* v. *Teamsters Union*, 346 U.S. 485, 490. Since in the field of union security, the controlling substantive regulations admittedly are fashioned, not by Congress, but by the several State legislatures, the need for exclusive federal remedies and procedures does not arise.

(3) Even if conduct which violates a State right-to-work law were automatically a federal unfair labor practice, concurrent State jurisdiction would not unduly impede the Board's administration of Sections 8(a)(3) and 8(b)(2). The States regularly exercise a measure of concurrent jurisdiction over many types of conduct—*e.g.*, violence, secondary boycotts, and breaches of collective bargaining agreements—which would also constitute an unfair labor practice cognizable by the Board. In the face of these examples, the possibility of inconsistent determinations in a controversy over union security is not persuasive that Congress, despite all the history to the contrary, must have intended to deprive the States of jurisdiction to remedy violations of their own right-to-work laws.

II

Although the Board has never decided the question, and it need not be decided in the present case, we submit that the execution and application of a collective bargaining agreement satisfying the conditions of the proviso to Section 8(a)(3) is not a federal unfair labor practice even if it violates state law. Concededly, the words of the statute will bear a contrary construction. Moreover, there are other occasions upon which the Board is required to take State law into account in administering the provisions of the Act. See *Fort Industry Co.*, 77 NLRB 1287, 1299; *Giant Food Shopping Center, Inc.*, 77 NLRB 791. However, the spontaneous under-

standing of Section 14(b) is only that it prevents any employer or labor union from defeating the normal application of State law prohibiting union security agreements by claiming that the agreement was "authorized" by federal law. And the foregoing cases do not provide precedents for treating a violation of State law as *ipso facto* a violation of the federal Act.

The accepted practice of using the processes of the Board to enforce federal policy and leaving the enforcement of State right-to-work laws to the States is supported by a number of persuasive considerations: First, it is inherently unlikely that Congress would have wished to make the federal agency an instrument of State policy. Second, nothing in the legislative history indicates that Congress intended to put federal sanctions behind State laws. Third, the compelling inference that Congress intended the States to have jurisdiction to enforce their own laws prohibiting union-security agreements adds strength to the foregoing considerations. Whatever advantages might be claimed for having State prohibitions enforced exclusively by a centralized federal agency are absent if the State courts have current power to adjudicate controversies involving union security agreements. Indeed, on the latter assumption, it is difficult to see what conceivable object of national labor policy would be served by adding the sanctions of the Board to sanctions already available in the State courts for the enforcement of State laws more restrictive than national policy.

ARGUMENT

INTRODUCTION

The question presented—whether a State has jurisdiction to grant relief against a union-security contract prohibited by State law—involves several related provisions of the National Labor Relations Act. Section 8(a)(1) provides that it shall be an unfair labor practice for an employer—

> to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7.

Among those rights is the right to form, join or assist a labor organization or to refrain from such activities.

Section 8(a)(3) provides that it shall be an unfair labor practice for an employer—

> by discrimination in regard to hire or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization * * * to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment. * * *

Section 8(b)(2) makes it an unfair labor practice for a labor organization—

> to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) * * *

Finally, Section 14(b) provides—

> Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

Without the proviso to Section 8(a)(3) an employer and a labor organization representing employees in an industry affecting interstate commerce would both commit an unfair labor practice by executing and applying a union shop agreement. The proviso gives them that privilege, at least in the absence of anything to the contrary in State law, provided that the conditions laid down in the proviso are met.

The Court's opinion of June 3, 1963 (373 U.S. 746), raises two related questions concerning the interplay between these provisions and Section 14(b):

> (1) Does Section 14(b) make compliance with State law a further qualification to the proviso of Section 8(a)(3) so that the privilege of executing a union security contract without violating Section 8(a) (1) and (3) and Section 8(b)(2) depends in part upon a showing that the contract is not prohibited by State law?

(2) Has a State jurisdiction to grant remedies to persons injured or threatened with injury by a union security contract that violates the State's laws?

Only the second question is squarely presented by the instant case. The first bears upon it, as the Court pointed out, for if State law is irrelevant in the National Labor Relations Board's administration of Sections 8(a) (1) and (3) and 8(b)(2), then there are few problems of concurrent jurisdiction and the only remedies for violation of the State's substantive law are those provided by the State. On the other hand, if the national Board is to take State law into account in administering the federal Act, there is less need for State remedies and their existence might create somewhat more danger of interference with the federal labor policy and its administration.

Nevertheless, we believe it more appropriate to come directly to the question, does Section 14(b) allow the States to provide their own remedies for violation of State right-to-work laws. Both questions depend upon the intent of Congress. No one doubts either the power of Congress to provide that federal law shall not exclude State jurisdiction, or its authority to make the existence of an unfair labor practice redressable by the federal agency turn partly upon State substantive law. In the present situation, the one purpose that we find unmistakeably clear in the legislative history and adequately expressed in the statute is the intent of Congress to leave the States free to adopt and enforce their own laws concerning union-

security contracts, independently of the National Labor Relations Act. This State jurisdiction includes, we believe, the power to prevent or punish the actual execution or application of a union-security contract, and to award damages for a violation, but it does not extend to *any* conduct that is found to tend towards violation, for that would plainly interfere with exclusive federal jurisdiction over other aspects of labor-management relations.

The more doubtful question, whether the Board is to give effect to State law in administering Sections 8(a) (1) and (3) and 8(b)(2), should be resolved when the issue actually arises, with that clear intention not to oust the States of jurisdiction as a predicate, instead of facing the doubtful question without the guidance of the related intent.

Accordingly, we present first our reasons for urging that the States have jurisdiction to grant relief for violation of their own laws prohibiting union-security contracts. We then submit that, even if the execution and application of a union-security contract which violates State law is a federal unfair labor practice, the exercise of concurrent State jurisdiction to prohibit violations of State right-to-work laws would not result in such interference with the Board's operations as to justify concluding that the States may not also afford a remedy. Finally, we suggest that, if the Court feels the question must be decided, State law should be held irrelevant in the administration of Sections 8(a)(1) and (3) and 8(b)(2), with the result that the States will redress violations of

State law and the federal agency will redress only violations of federal law, as has been the uniform practice since 1947.

I

THE NATIONAL LABOR RELATIONS ACT DOES NOT PREEMPT THE JURISDICTION OF THE FLORIDA COURTS TO ENJOIN ENFORCEMENT OF AN AGENCY SHOP AGREEMENT

A. THE LANGUAGE AND LEGISLATIVE HISTORY OF SECTION 14(b) DEMONSTRATE THAT CONGRESS LEFT THE FIELD OPEN FOR STATE REMEDIES FOR THE VIOLATION OF STATE LAWS PROHIBITING UNION SECURITY AGREEMENTS

1. Although the language may be open to either interpretation, the words of Section 14(b) strongly favor the view that Congress thereby left the way open for a State to assert jurisdiction to deal with a union security contract according to State law even though the employer and labor union were covered by the National Labor Relations Act. In the absence of federal law, there could be no doubt of the State's jurisdiction. Congress was not legislating in 1947 against an elaborate background of decisions, such as exist today, giving the NLRB exclusive jurisdiction as against State regulation of labor-management relations.[2] State law alone had governed both collective agreements and strikes and picketing. The States had been exercising a measure of concurrent jurisdiction over unfair labor practices and questions of rep-

[2] E.g., *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, and cases cited.

resentation.[3] The only troublesome question appeared to be whether the federal statute would exclude the operation of State law by authorizing the execution of some forms of union security agreements and prohibiting others. Compare *Hill* v. *Florida*, 325 U.S. 538, which was, in 1947, the leading decision upon federal preemption in the field of labor-management relations. The words of Section 14(b) simply and directly negate any implication that the federal law granted authority to execute union security contracts notwithstanding State law, viz—

> Nothing in this Act shall be construed as authorizing the execution or application of [union security] agreements * * * in any State or Territory in which such execution or application is prohibited by State or Territorial law.

The use of the word "authorize" in Section 14(b) is doubtless to be attributed partly to reasoning of the Court in *Hill* v. *Florida, supra*,[4] and partly to the fact that the danger of an inference of federal preemption would be increased by the provision in Section 9(e) of the original Taft-Hartley Act for federally-conducted elections to ascertain whether a majority of the employees wished "to authorize" the negotiation of a union shop agreement. With any implied au-

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[3] *Davega City Radio, Inc.* v. *State Labor Relations Board*, 281 N.Y. 13, 22 N.E. 2d 145; *Wisconsin Labor Relations Board*, v. *Fred Rueping Leather Co.*, 228 Wisc. 473, 279 N.W. 673. But cf. *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U.S. 767.

[4] The Court concluded (p. 542) that "The collective bargaining which Congress has *authorized* contemplates two parties free to bargain, and cannot thus be frustrated by state legislation." [Emphasis supplied.]

thorization thus negated, the Act left the States their original jurisdiction.

The interpretation of Section 14(b) proposed by petitioner, that a State may enact substantive law prohibiting union security contracts but may not enforce its own law, would be a unique division of State and federal authority having no precedent in our legal history. Congress has sometimes preempted fields of regulation and sometimes left the way open for concurrent State regulation, but we are aware of no instance in which Congress has authorized the States to establish the applicable substantive law yet forbade them to provide sanctions. The absorbtion of State law where the United States has exclusive territorial jurisdiction is an altogether different matter. If Congress had intended so radical an innovation, in a field susceptible of concurrent regulation, the plan would surely have drawn more attention in the debate and have been more clearly expressed in the statute.

For there were much simpler and more direct ways of giving effect to the intent that petitioner attributes to Congress. If all that was intended was to add a further qualification to the proviso to Section 8(a)(3) for the purposes of federal law, so that a union security contract which violated State law would be an unfair labor practice under Sections 8(a)(1) and (3) and 8(b)(2), then Congress could easily have inserted into the proviso the initial condition—

> (i) if such agreement is permitted by State or Territorial law;

and then have numbered the other conditions (ii) and

(iii).[5] It seems significant, therefore, that Congress chose to deal with State law in a separate section, entitled "Limitations," one subsection of which expressly bars the States from compelling employers to bargain with supervisors while the other preserves State power to prohibit union security agreements.

2. The legislative history of Section 8(3) of the original Wagner Act and of Sections 8(a) (3) and 14(b) of the Taft-Hartley Act shows beyond peradventure that Congress intended to leave the States free to exercise full concurrent jurisdiction over union security agreements.

Prior to the Wagner Act, the States had unquestioned power to enact and enforce prohibitions and restrictions upon the closed shop and other forms of union-security agreement. The proviso to Section 8(3) made it plain that nothing in the Wagner Act or any other federal law should preclude an employer from making such an agreement with a union properly designated as the employees' representative, but it left State power unaffected. The legislative history makes that purpose plain. The Senate Report on the bill which was ultimately enacted stated:

> The proviso attached to the third unfair-labor practice deals with the question of the closed shop. Propaganda has been widespread that this proviso attaches special legal sanctions to the closed shop or seeks to impose it upon all industry. This propaganda is absolutely false. The reason for the insertion of the proviso is as follows: According to some interpretations; the provision of section 7(a) of the National Industrial Recovery Act, as-

[5] For the history of such a draft, see pp. 54–55, *infra*.

suring the freedom of employees "to organize and bargain collectively through representatives of their own choosing," was deemed to illegalize the closed shop. The committee feels that this was not the intent of Congress when it wrote section 7(a); that it is not the intent of Congress today; and that it is not desirable to interfere in this drastic way with the laws of the several States on this subject.

* * * In other words, the bill does nothing to facilitate closed-shop agreements or to make them legal in any State where they may be illegal; it does not interfere with the *status quo* on this debatable subject but leaves the way open to such agreements as might now legally be consummated. * * *

The House Report contained similar language:

* * * The proviso does not impose a closed shop on all industry; it does not give new legal sanctions to the closed shop. All that it does is to eliminate the doubts and misconstructions under this bill * * * The bill does nothing to legalize the closed-shop agreement in the States where it may be illegal; but the committee is confident that it would not be the desire of Congress to enact a general ban upon closed-

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• S. Rep. No. 573, 74th Cong., 1st Sess. 11-12, 2 Leg. Hist. of the NLRA, 1935 (G.P.O., 1949) 2311.

Similarly, a memorandum comparing S. 1958, the bill which was enacted, with an earlier bill pointed out (1 Leg. Hist. (1935) 1353): "The proviso does not make closed-shop agreements legal; it merely says that nothing herein should illegalize them. The operation of State common law on the subject is left unaffected."

> shop agreements in the States where they are legal. * * *[8]

In support of the bill in the Senate, Senator Wagner stated that the proviso:

> * * * does no more than to legalize a closed shop agreement * * * where it is now sustained by the public opinion of the State.
>
> * * * * * *
>
> The provision will not change the status quo. That is the law today; and whenever it is the law today that a closed-shop agreement can be made, it will continue to be the law. By this bill we do not change that situation. * * *[9]

Similarly, Representative Connery, manager of the bill in the House, in response to a charge that the proviso would make it possible for 51 percent of the employees to bring about the discharge of the other 49 percent, declared:

> * * * The closed-shop proposition in this bill does not refer to any State which has any law forbidding the closed shop. It does not interfere with that in any way.[10]

At the time the Wagner Act was passed, State prohibitions in the union-security field generally took the form of common-law adjudications holding the closed shop to be an illegal object of a strike or picketing, and they were enforcible by injunctive remedies.[11] By 1947, however, 12 States had enacted statutes or

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[8] H. Rep. No. 969, 74th Cong., 1st Sess., 17, 2 Leg. Hist. (1935) 2997.

[9] 79 Cong. Rec. 7673, 2 Leg. Hist. (1935) 2394-2395. See also 79 Cong. 7570, 2 Leg. Hist. (1935) 2335.

[10] 79 Cong. Rec. 9726, 2 Leg. Hist. (1935) 3217.

[11] See Frankfurter and Greene, *The Labor Injunction* (1930), pp. 29-30.

constitutional prohibitions outlawing or restricting the closed shop and other forms of union-security agreement.[11] These "right-to-work" laws were enforcible by a variety of sanctions—injunctions, damage suits, criminal fines, and (in three instances) imprisonment. Congress was thoroughly informed about State right-to-work laws during the Taft-Hartley debates.[12] The legislative history unmistakeably demonstrates that Congress did not intend to abandon the Wagner Act's policy of putting no federal obstacle in the way of the enactment and enforcement of such State legislation.

The chief innovations wrought by the Taft-Hartley Act in the union security field were to outlaw the closed shop as a matter of federal law and restrict the execution and application of union shop contracts. The changes were accomplished by retaining the language of the original proviso to Section 8(3) that—

> nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization * * * to require as a condition of employment membership therein

but adding a number of qualifications. One permitted the contract to require membership only after

[11] *State Laws Regulating Union-Security Contracts*, 21 LRRM 66. The constitutionality of these laws was sustained in *Lincoln Federal Labor Union* v. *Northwestern Iron and Metal Co.*, 335 U.S. 525 (1949).

[12] E.g., H. Rep. No. 245, 80th Cong., 1st Sess. 34, 1 Leg. Hist. of the LMRA, 1947 (G.P.O., 1948) 325; S. Rep. No. 105, 80th Cong., 1st Sess. 6, 1 Leg. Hist. (1947) 412; Hearings before Commitee on Labor and Public Welfare, U.S. Senate, 80th Cong., 1st Sess., on S. 55 and S.J. Res. 22, pp. 64–67, 806–807.

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30 days of employment. A second required a certificate by the Board that at least a majority of the employees eligible to vote in an election under Section 9(e) shall have voted "to authorize" such labor organization to make such an agreement.[13] Another proviso limited the occasions upon which a discharge might be justified by a union security agreement.

Since Congress was thus undertaking, for the first time, to regulate the subject of union security, there was fear that its entry into the field might be construed to extinguish the power of the States to regulate arrangements falling within the federal proviso. Such an inference, to be sure, seemed implausible to some observers in view of the widespread recognition that the Wagner Act proviso had not been intended to override more restrictive State laws even though the Wagner Act, too, had contained a comprehensive prohibition against discriminatory conduct by employers. At that time, as we have said, there was no substantial body of decisions asserting broad federal occupation of the field of labor-management relations and the practice favored concurrent State jurisdiction. The Senate Labor Committee believed it unnecessary to add a special provision disclaiming intent to preempt the field of union security agreements (*infra*, p. 24). The House Labor Committee was more cautious and included in its bill a Section 13 (which, as revised in conference, became Section 14(b)):

> Nothing in this Act shall be construed to invalidate any State law or constutitional pro-

[13] This provision was subsequently repealed. Act of October 22, 1951, 65 Stat. 601.

> vision which restricts the right of an employer to make agreements with labor organizations requiring as a condition of employment membership in such labor organization, and all such agreements, insofar as they purport to impose such requirements contrary to the provisions of the law or constitution of any State, are hereby divested of their character as a subject of regulation by Congress under its power to regulate commerce among the several States and with foreign nations, to the extent that such agreement shall, in addition to being subject to applicable preventive provisions of this Act, be subject to the operation and effect of such State laws and constitutional provisions as well."[14]

This cumbersome language obviously disclaims, in the most unmistakable terms, any impairment of State jurisdiction to enact and apply laws regulating or prohibiting union-security contracts. The House Report described the provision as follows:

> SECTION 13. Since by the Labor Act Congress preempts the field that the act covers insofar as commerce within the meaning of the act is concerned, and since when this report is written the courts have not finally ruled upon the effect upon employees of employers engaged in commerce of State laws dealing with compulsory unionism, the committee has provided expressly in section 13 that laws and constitutional provisions of any State that restrict the right of employers to require employees to become or remain members of labor organizations are

[14] Sec. 13 of H.R. 3020, 80th Cong., 1st Sess., 1 Leg. Hist. (1947) 207–208.

> valid, notwithstanding any provision of the National Labor Relations Act. In reporting the bill that became the National Labor Relations Act, the Senate committee to which the bill has been referred declared that the act would not invalidate any such State law or constitutional provision. The new section 13 is consistent with this view.[15]

Elsewhere, the House Report referred to Section 13 as "a special provision * * * to give the States a concurrent jurisdiction in respect of closed-shop and other union-security arrangements."[15a] At still another point, the Report stated:

> * * * *by section 13 the United States expressly declares the subject of compulsory unionism one that the States may regulate concurrently with the United States,* notwithstanding that the agreements affect commerce, and notwithstanding that the State laws limit compulsory unionism more drastically than does Federal law. * * *[16] [Emphasis added.]

If Section 13 of the House bill had been enacted without change, there could be no question of the power of the States to enforce their right-to-work prohibitions.

The Conference Committee substituted for Section 13 of the House bill the more concise language now found in Section 14(b). Petitioners find significance in the change and asks the Court to infer that Con-

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[15] H. Rep. No. 245, 80th Cong., 1st Sess. 44; 1 Leg. Hist. (1947) 335.

[15a] H. Rep. No. 245, *supra*, 40; 1 Leg. Hist. (1947) 331.

[16] H. Rep. No. 245, *supra*, 34; 1 Leg. Hist. (1947) 325.

gress abandoned the plan to allow the States concurrent jurisdiction (Br. p. 22). The legislative record belies the contention. The House Conference Report clearly and explicitly states that no change in substance was intended:

> Under the House bill there was included a new Section 13 of the National Labor Relations Act to assure that nothing in the act was to be construed as authorizing any closed shop, union shop, maintenance of membership, or other form of compulsory unionism agreement in any State where the execution of such agreement would be contrary to state law. Many states have enacted laws or adopted constitutional provisions to make all form of compulsory unionism in those States illegal. It was never the intention of the National Labor Relations Act * * * to preempt the field in this regard so as to deprive the States of their powers to prevent compulsory unionism. Neither the so-called "closed shop" proviso in section 8(3) of the existing act nor the union shop and maintenance of membership proviso in section 8(a)(3) of the conference agreement could be said to authorize arrangements of this sort in States where such arrangements were contrary to the State policy. To make certain that there should be no question about this, section 13 was included in the House bill. *The conference agreement, in section 14(b), contains a provision having the same effect.*[17] [Emphasis added.]

[17] H. Rep. No. 510, 80th Cong., 1st Sess. 60, 1 Leg. Hist. (1947) 564.

In the Senate, Senator Taft gave the principal exposition of the Conference Report. He too made it clear that the intent of section 14(b) was to give continuing effect to the previous policy of avoiding federal interference with the enforcement of State laws prohibiting union security agreements:

> * * * in the report of the [Senate Committee], we stated that * * * there was nothing in the bill as originally reported by the committee which in any way would invalidate the provisions of a State law prohibiting the closed shop. * * * In it we pointed out that when the National Labor Relations Act was enacted, it was made clear in the report at that time that the proviso in section 8(3) was not intended to override State laws regulating the closed shops. At that time the Senate Committee stated that the bill did nothing to facilitate closed-shop agreements or to make them legal in any State where they may be illegal.
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> In other words, the whole spirit of the Wagner Act and its provisions would prohibit a closed shop, because it prohibits discrimination against people who are not members of labor unions. In order to preserve that right and to keep the Wagner Act itself from abolishing the closed shop everywhere, it was necessary to write in this proviso. *But that did not in any way prohibit enforcement of State laws which already prohibited closed shops.*
>
> *That has been the law ever since that time. It was the law of the Senate bill; and in putting in this express provision from the House bill,*

> *we in no way change the bill as passed by the Senate.* * * *[18] [Emphasis added.]

And, in the House, there was the following colloquy between Representatives Kersten and Hartley with apparent reference to Section 14(b) (93 Cong. Rec. 6383–6384, 1 Leg. Hist. (1947) 883):

> Mr. KERSTEN. * * * I would like to ask the gentleman about that portion which pertains to the validity of State laws. We are very anxious that disputes be settled at the State level insofar as it is possible. * * *
>
> Mr. HARTLEY. That is the sense of the language of the bill and of the report. *That is my interpretation of the bill, that this will not interfere with the State of Wisconsin in the administration of its own laws.* * * * [Emphasis added.]

In the face of these comments by the co-sponsors and architects of the Taft-Hartley Act, it is difficult to see how any Senator or any Representative who sup-

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[18] 93 Cong. Rec. 6519–6520, 2 Leg. Hist. (1947) 1596–1597. Senator Barkley added (93 Cong. Rec. 6520, 2 Leg. Hist. (1947) 1597–1598: "The provision of the measure which exempts any State from the operation of its provisions, if such State has outlawed the closed shop, therefore in effect adopts the State as the agency through which the regulation of interstate commerce shall take place, insofar as the closed shop is regulated. * * * * All that the legislatures need to do in order to impose a ban against all closed shops throughout the United States is to meet and to say, 'We will not have any in this State,' and thereby both in interstate commerce and intrastate commerce the closed shop will be banned, and the employees will not even be able by an election to establish a union shop. * * *".

ported the Act could possibly have regarded his vote as a vote to take away from the States the power to enforce their own "right-to-work" laws.

Petitioners argue (Pet. Br. 19) that the legislative history contains no evidence that Congress considered and then decided to "confer remedial jurisdiction" on the State courts for violations of their right-to-work laws. That contention frames the issue in a wholly misleading form. The question is not whether Congress decided to "confer" remedial jurisdiction; the question is whether it made a deliberate choice to take away from the States the jurisdiction, both substantive and remedial, that they were already exercising, leaving them the novel right to make declarations of substantive policy to be enforced by a federal agency. Nothing in the legislative history lends the slightest support to that inference. On the contrary, Senator Taft's emphatic assertion that the Act he sponsored, like the Wagner Act, "did not in any way prohibit enforcement of" State right-to-work laws (*supra*, p. 24), and Representative Hartley's assurance that "this will not interfere with the State of Wisconsin in the administration of its own laws" (*supra*, p. 25) leave no doubt that the States remained free to effectuate, and not merely to announce, their legislative decisions.

Nor is there any merit in petitioners' suggestion that if Congress had intended the States to apply the varied sanctions, critics of the bill would have expressed specific opposition (Pet. Br. 19). One important critic, Senator Barkley, did attack Section 14(b) on the ground that it "in effect adopts the State

as the agency through which the regulation of interstate commerce shall take place, insofar as the closed shop is regulated" (93 Cong. Rec. 6520, 2 Leg. Hist. (1947) 1597). Senator Morse also objected that "This amendment [Section 14(b)] proposes that we exempt from the national policy, as it relates to interstate commerce, national jurisdiction over these matters as they involve the closed shops and union shops, in the case of any State which passes an anti-closed shop or anti-union shop bill." (93 Cong. Rec. 6456; 2 Leg. Hist. (1947) 1561). It is clear that any opponent of the bill who would have voiced objection to an explicit grant of remedial power to the States would also have spoken out against Section 14(b) as written, for in light of the debates no one could have doubted the substantial "danger," at least, that the amendment would be construed to allow such an exercise of State jurisdiction.

The obvious fact is that neither supporters nor opponents of the Taft-Hartley Act made the sophisticated distinction between State remedies and State substantive rules which petitioner now proposes; both facets of State power were treated together, and neither was preempted. Petitioner's analysis would transform Section 14(b)—a provision inserted in the Act out of an abundance of caution in order to remove any possible doubt that the States were free to play their traditional role in the union security field—into an instrument of federal preemption.

We recognize that Section 14(b), as thus construed, appears to be a glaring exception to the general rule

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of exclusive federal jurisdiction that now prevails in the case of businesses whose labor relations affect interstate commerce. *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, and cases cited; *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448. Section 14(b) has often been criticized upon that ground.[19] We show in the next section that the existence of State power to enforce State right-to-work laws will not greatly interfere with the administration of other sections of the National Labor Relations Act. Furthermore, whatever the anomaly in Section 14(b), the rule of federal preemption is not a constitutional principle binding Congress; it is a determination of legislative intent. The exception could not have seemed nearly as anomalous to Congress in 1947 as it seems today. The doctrine of exclusive jurisdiction had not emerged. The States were applying their own laws to strikes and picketing, and there was little, if any, thought given to the possibility that the enactment of Section 8(b) might occupy the field. States were also exercising concurrent jurisdiction over unfair labor practices. (See pp. 13–14, *supra*.) Federal jurisdiction could not entirely exclude State law from the whole field of labor-management relations, for the States would obviously retain some power to regulate substantive terms and conditions of employment and misconduct such as violence. See *Allen-Bradley Local No. 1111* v. *Wisconsin E.R. Board*, 315 U.S. 740.

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[19] *E.g.*, Cox, *Federalism and the Law of Labor Relations*, 67 Harv. L. Rev. 1297, 1317–1320; Wellington, *Labor and the Federal System*, 26 U. of Chi. L. Rev. 542, 548.

There was no contemporaneous doubt about the intent and effect of section 14(b). Less than two years after its enactment, the Court decided *Algoma Plywood Co.* v. *Wisconsin Employment Relations Board*, 336 U.S. 301. Both the majority and the dissenting justices agreed that under section 14(b) the States had jurisdiction to enact and enforce laws prohibiting union security agreements. Speaking for the Court, Mr. Justice Frankfurter said (pp. 313-314)—

> Other provisions of the Taft-Hartley Act make it even clearer than the National Labor Relations Act that the States are left free to pursue their own restrictive policies in the matter of union-security agreements. Because § 8(3) of the new Act forbids the closed shop and strictly regulates the conditions under which a union-shop agreement may be entered, § 14(b) was included to forestall the inference that federal policy was to be exclusive. * * *

And later he spoke of "the permission granted the States by § 14(b) of the Taft-Hartley Act to *carry out policies* inconsistent with the Taft-Hartley Act itself." 336 U.S. at 315, italics supplied.

Although Mr. Justice Black and Mr. Justice Douglas, dissenting, concluded that the State could not award back pay to an employee discharged under a contract which the War Labor Board ordered the employer to make, they noted that—

> The Taft-Hartley Act expressly granted the states more leeway in regard to enforcement of their own policies as to contracts of the type here involved. * * *

citing Section 14(b). 336 U.S. at 325.

Within a year after the enactment of Section 14(b) all five members of the National Labor Relations Board joined in the view that Section 14(b) allows the States to exercise jurisdiction over union-security contracts even though the contract accords with federal policy. *Giant Food Shopping Center, Inc.*, 77 NLRB 791. The majority said (p. 793)—

> Section 14(b), therefore, in effect removes all Federal restrictions upon existing and future State legislation prohibiting compulsory unionism insofar as the National Labor Relations Act is concerned, even where such legislation may affect employees engaged in interstate commerce.

After referring to the legislative history, they continued (p. 794)—

> Thus, the legislative history preceding the enactment of Section 14(b) fully supports the otherwise clear language of this provision as establishing the intent of Congress to leave to the exclusive jurisdiction of the States the prohibition of union-shop agreements to the extent that prohibition in this respect now exists or may hereafter exist in such States.

Chairman Herzog and Member Houston also said (p. 798)—

> The debates and Committee Reports antedating the enactment of Section 14(b) suggest * * * that Congress, aware of the Supreme Court's conclusion in *Hill* v. *Florida* and the *Bethlehem Steel* cases that the Federal power is paramount over industries in which labor disputes might impair interstate commerce, intended to make certain that the new Congressional enactment did not operate to prevent the States

> from continuing to enforce *their own* laws concerning union-security agreements. * * *

Contemporary commentators all expressed the view that Section 14(b) was intended to avoid ousting the States of jurisdiction over union-security agreements.[20] In the ensuing nationwide debate over right-to-work laws we have never seen it suggested that the States have no power to enforce their own laws because the National Labor Relations Board is charged with that function.[21]

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[20] CCH Labor Law Reports Edition, *New Labor Law, LMRA, 1947* (1947), pp. 72–73, par. 94; BNA, *The Labor-Management Relations Act of 1947; summary and section-by-section commentary* (1947), p. 25; Feinsinger, *Federal-State Relations Under the Taft-Hartley Act*, 1 N.Y.U. Conf. on Labor (1948), pp. 487–491; Smith, *The Taft-Hartley Act and State Jurisdiction Over Labor Relations*, 46 Mich. L. Rev. 593, 598–599 (1948); Research Institute of America, *The Taft-Hartley Labor Law, Its Effect on Your Labor Relations* (1947), p. 46; National Association of Manufacturers, *State Power and the Labor-Management Relations Act*, 9 N.A.M. Law Digest 103 (1947); Killingsworth, *State Labor Relations Act*, Univ. of Chicago Press (1948), p. 244; Note, *Union Control Over the Workers' Employment As Affected By the Taft-Hartley Act*, 33 Iowa L. Rev. 539, 552–553 (1948); Note, *Union Security Devices and the Taft-Hartley Act*, 96 U. Pa. L. Rev. 101, 113 (1947). See also Meltzer, *The Supreme Court, Congress and State Jurisdiction over Labor Relations*, 59 Col. L. Rev. 6, 41, n., 26.

[21] Coogan, *Voluntary Unionism For Free Americans*, National Right to Work Committee; Morgan, *Union Security—Federal or State Sphere*, 4 Lab. L.J. 815 (1953); Meyers, *"Right to Work" in Practice*, Fund for the Republic (1959); Gibson, *The Legal and Moral Basis of Right to Work Laws*, Address before the Section of Labor Relations Law, ABA, National Right to Work Committee (1955); Toner, *Right to Work Laws: Public Frauds*, 8 Lab. L.J. 193 (1957); Reilly, *States Rights and the Law of Labor Relations*, AEA, Inc. (1955), pp. 16–21; Pollitt, *Right-to-Work Law Issues: An Evidentiary Approach*, National Council for Industrial Peace; CIO *The Case Against Right to Work Laws*, pp. 96–102.

B. STATE JURISDICTION TO ENFORCE STATE LAWS PROHIBITING UNION-SECURITY AGREEMENTS WILL NOT INTERFERE WITH THE ADMINISTRATION OF THE NATIONAL LABOR POLICY TO SUCH AN EXTENT AS TO REQUIRE FEDERAL PREEMPTION IN THE FACE OF THE EVIDENCE OF A CONTRARY CONGRESSIONAL INTENT

At several points State laws prohibiting union-security agreements become closely interrelated with the administration of the National Labor Relations Act. Dual sovereignty invariably leaves some roughness at the joints, and Congress' anomalous decision to allow State intrusion into an area as close to the heart of labor-management relations as union security, even though it otherwise gave the Board exclusive jurisdiction, increases the problems of accommodation. We think it plain, however, that the difficulties are not nearly great enough to justify the conclusion that Congress must be taken, despite the contrary evidence, to have intended to withhold from the States power to enforce their own laws even though they were substantively applicable to employers and unions subject to NLRB jurisdiction.

1. *Recognition of State jurisdiction to punish or enjoin the execution or application of contracts requiring union membership as a condition of employment will not interfere with the exercise of the federal right to engage in strikes, picketing and other concerted activities*

Section 14(b) prevents any preemption of State jurisdiction to deal with "the execution or application" of a contract requiring membership in a union as a condition of employment. The State's authority plainly extends, if it has any power to administer its own law, to enjoining or punishing the execution of a union-security agreement and to awarding damages to

any person injured thereby. Its authority includes refusing to enforce the illegal condition in the courts and to injunctions against discharges for failure to join a union or maintain membership therein. No doubt a State may also award damages to any employee discharged under such a contract or compel an accounting for any payments coerced by threatening loss of employment thereunder.

It seems plain, however, that the States' power does not extend to enjoining *any* conduct which the State finds has a tendency or purpose to bring about the execution of a union-security contract. The point is illustrated by *Local Union 438, Construction & General Laborers' Union* v. *Curry*, 371 U.S. 542. In that case the respondent was a firm of contractors who had undertaken a construction job for the City of Atlanta. Shortly after the work began various unions in the area visited the contractor, whose employees were not represented by a labor union. According to the contractor, the unions pressed for the hiring of union labor, but the unions insisted that their only demand was that the contractor pay the union wage scales prevailing in the area. Subsequently, the petitioner placed a single picket at the construction site. The employees of other contractors on the job refused to work, and the picketing caused difficulty in obtaining delivery of supplies and materials. At *nisi prius* a temporary injunction was denied without opinion. The Supreme Court of Georgia, although it found the picketing to be peaceful and the evidence sufficient to sustain a finding that the contractors were not paying the union wage scale,

nevertheless concluded that the purpose of the picketing was to force the contractor to employ only union labor, which was a violation of the Georgia right-to-work law. This Court reversed, holding upon authority of *Local Union 429, Electrical Workers* v. *Farnsworth and Chambers Co.*, 353 U.S. 969, reversing 201 Tenn. 329, 299 S.W. 2d 8, that the controversy lay within the exclusive jurisdiction of the National Labor Relations Board.

Both *Curry* and *Farnsworth* involved disputes over union organization. To allow State tribunals to take evidence upon the purposes of picketing in a controversy over union recognition or organization and then to issue injunctions whenever convinced that the union's ultimate objective was a closed or union-shop agreement, would seriously interfere with the national labor policy in areas over which Congress left no jurisdiction in the States. Section 7 guarantees the right to engage in concerted activities. Section 8(b) reveals the increasing care with which Congress has restricted *some* uses of economic weapons in connection with organizational activities while scrupulously leaving *other* uses uninhibited. Although the preemption of State authority has the collateral advantages of avoiding conflicting findings and providing the courts with the advice of an expert agency, the basic reason for giving the Board exclusive jurisdiction is that the States might frustrate the national policy by inhibiting conduct that the Act intentionally leaves free." As

" See also, Cox, *Federalism in Labor Law*, 67 Harv. L. Rev. 413, 1315–1317, 1322–1324 (1954).

Mr. Justice Jackson said for a unanimous Court in *Garner* v. *Teamsters Union*, 346 U.S. 485, 499–500—

> The detailed prescription of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint. For the policy of the national Labor Management Relations Act is not to condemn all picketing but only that ascertained by its prescribed processes to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing. For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits.[22]

Multiplicity of tribunals is quite as likely to produce disparate law in action, as differences in substantive law. *Garner* v. *Teamsters Union, supra.* Especially in the area of organizational activity the aims and purposes of a strike or picketing are often disputed, poorly defined or ill-expressed. *Farnsworth* and *Curry* are cases in point, for in neither was the object of the picketing quite certain. While the State court found that the union's goal was to have only union members employed on the job, the Board might have found that the purpose of the picketing was to secure recognition as the representative of the employees involved, to persuade employees to join

[22] See also *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 242–243.

the union, or to inform the public that the wage rates on the job did not conform to area standards. The first objective is ultimately within the field of union security encompassed by Section 14(b) and Sections 8(a)(3) and 8(b)(2), but the other three are not.[24] Thus, if the States were permitted to enforce their right-to-work laws against strikes and picketing, there would be grave risk that many courts might find a forbidden union-security objective where the Board would find none imminent, and thus might punish or restrain conduct which the federal Act protects or at least leaves to the free play of economic forces. In order, therefore, to preserve the delicate balance between the interests of labor and management which the Act has drawn, Section 14(b) must be construed in such a way as to give the Board exclusive responsibility in this peculiarly sensitive area.

There is a world of difference between the situations exemplified by *Farnsworth* and *Curry* and any jurisdiction asserted by the Florida courts. Here, the illegal contract has been executed. The complaint alleges that money has been collected from employees under the contract. While the prayers for relief include a request for an injunction against a strike or other activity seeking to compel the employer to comply with the agency shop clause, the heart of the

[24] If pure recognition or organization is the object, the picketing would be regulated by Section 8(b)(7) of the Act, as amended in 1959. If the object is truly "area standards," the picketing would be protected by Section 7 of the Act. See *Claude Everett Construction Co.*, 136 NLRB 321.

relief sought appears to be a declaration of the invalidity of the union-shop clause, an injunction against its application, and an accounting of the monies collected thereunder (R. 6–7). Since the district court dismissed the complaint and the Florida Supreme Court merely reversed and remanded for further proceedings, no one can be certain what relief the complainants may be finally awarded. It is plain, however, that substantial relief within the prayer of the complaint might be granted without in any way interfering with the Board's exclusive jurisdiction over strikes and picketing.

Under these circumstances it would seem unnecessary to decide exactly where the line is to be drawn between the exclusive authority of the national Board and the jurisdiction remaining in the States. Plainly, there is no State power to deal with conflicts over union organization and collective bargaining merely because there is a claim and possibly some evidence that the union's ultimate objective is to secure the employment of union labor. *Local 438, Construction & Laborers Union* v. *Curry, supra; Local 429, Electrical Workers* v. *Farnsworth and Chambers Co., supra.*[25] It might plausibly be argued that the States

[25] The decisions in the above cases can be read more narrowly. One possible reading is that Section 14(b) does not empower the States to enforce their restraints in circumstances where the conduct involved, though violative of State law, would also arguably constitute an unfair labor practice under the National Labor Relations Act. If, as we shall argue (*infra*, pp. 47–56), conduct which falls within the proviso does not become an unfair labor practice merely because it breaches State law, this interpretation of *Farnsworth* and *Curry* would mean that a

have no jurisdiction over peaceful strikes and picketing under any circumstances, but are limited to barring, punishing and redressing the actual execution of union-security contracts and discharges thereunder. In this view both the employer and the union could be

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State court could enjoin the discharge of an employee under an agency-shop clause, as in the present case, but that only the Board could adjudicate a discharge pursuant to a closed-shop agreement.

The Court arrived at its decision in those cases without the benefit of full briefs on the effect of Section 14(b), and of the *Garner* preemption cases on *Algoma*. *Farnsworth* was reversed on the basis of the petition for certiorari and the opposition thereto; the petition did not discuss Section 14(b) at all, and the opposition, although mentioning that provision, did not analyze the problem but merely asserted that the matter was settled by *Algoma*. See Petition for Certiorari and Opposition in *Local Union 429, Electrical Workers* v. *Farnsworth and Chambers Co.*, No. 891, October Term 1956. The Court heard argument in *Curry*, but the briefs that were filed dealt principally with the "final order" problem. The brief for the petitioner does not discuss Section 14(b) at all, and, although the brief for the respondent does, the problem is not analyzed in depth and the chief reliance is placed on cases which do not involve a preemption question for there was no claim that the businesses involved were subject to the Board's jurisdiction. See Briefs in *Local No. 438, Construction and General Laborers' Union* v. *Curry*, No. 87, October Term 1962.

As this Court recognized in *San Diego Building Council* v. *Garmon*, 359 U.S. 236, 241, the decisions in the preemption field have been worked out "in the course of a process of tentative, fragmentary illumination carried on over more than a decade during which the writers of opinions almost inevitably, because unconsciously, focus their primary attention on the facts of particular situations," and hence "language may have been used or views implied which do not completely harmonize with the clear pattern which the decisions have evolved." See also the Court's comment on *Auto Workers* v. *Wisconsin Board*, 336 U.S. 245 (359 U.S. at 245, n. 4).

enjoined from executing the unlawful contract and punished for any criminal violation. If the union compelled an unlawful discharge, it could be prosecuted with the employer as an aider and abettor, and held liable as a joint tort feasor.

This interpretation would leave theoretically open the somewhat incongruous possibility that a State might enjoin an employer from executing a union shop contract yet be powerless to prevent the union from using economic pressure to compel him to violate the decree or to punish him for complying with the statute. The anomaly is more apparent than real. If the union were in fact pressing for the employer to hire only union men, or to execute a union-shop contract even though it had not been designated as the bargaining representative, the national Board would have jurisdiction to deal with its activities as violations of Section 8(b)(2), for its conduct would not meet the conditions expressly stated in the proviso to Section 8(a)(3). If the union were the bargaining agent and were actually insisting upon a union-security contract prohibited by State law, the Board almost surely could grant the employer relief under Section 8(b)(3) on the ground that the union was refusing to bargain in good faith. Compare *National Labor Relations Board* v. *Borg-Warner Corp.*, 356 U.S. 342, 349.

Drawing the line at this point would resolve another difficulty. Controversies are likely to arise over whether a contract clause demanded by a union is subject to State regulation by virtue of Section 14(b) because it is an agreement "requiring membership in

a labor organization as a condition of employment"; for example, a check-off, hiring hall or true service fee.[25] There would be serious danger of interference with national policy if a State tribunal were permitted to interfere with the course of bargaining between an employer and the representative of his employees upon the ground that it was likely to terminate in a violation of State law, prior to any national determination of whether the contract was in fact within the area left open to State control. Confining to the national Board the scrutiny of demands and other conduct in the course of bargaining would minimize the danger of interference with the national policies declared in the Act and usually give the courts the benefit of a prior determination by an expert agency, without curtailing State power to deal with the actual execution and application of unlawful contracts. Even an injunction against the execution of a specific contract would be far less damaging than intrusion into the course of negotiations and any use of economic weapons.

A second, but less satisfactory, solution would be to allow the States to protect their citizens against pressures to induce the immediate execution of an illegal agreement by confining the preemption rule to cases in which the objective of the strike or picketing is disputed, while leaving the States free to deal with conduct *unequivocally aimed* at an *immediate violation* of State law. Where Congress has left a State free to

[25] For Board decisions in such areas, see *H. J. Homan Co.*, 137 NLRB 1043; *Houston Chapter, Associated General Contractors*, 143 NLRB No. 43, 53 LRRM 1299.

prohibit racial discrimination in employment (see *Colorado Anti-Discrimination Commission* v. *Continental Air Lines*, 372 U.S. 714), it would seem anomalous for Congress to prohibit the States from protecting employers against economic reprisals for failing to discriminate. Similarly, one might well argue that, having the undoubted power to regulate substantive terms and conditions of employment, the States must also have been left with power to deal with strikes and picketing unequivocally intended to accomplish an immediate violation.[27] The recognition of that jurisdiction could do little damage to the national labor policy. On the other hand, to allow a State agency to find the facts in the melange of a labor controversy or to deal with remote objectives that might well be abandoned as collective bargaining developed, would create the very kind of danger that the *Garner* rule was intended to avoid.

Thus, without prejudging future cases, it is clear that the opportunities for separating State jurisdiction over the actual execution and application of union-security contracts from the Board's exclusive jurisdiction over concerted activities are more than adequate to demonstrate that the recognition of State power in the former instance carries no serious threat to implementation of national labor policies in the latter sphere. For the same reason, there is no inconsistency between the sustaining of State jurisdiction in *Algoma Plywood Co.* v. *Wisconsin E.R. Board*, 336 U.S. 301, which involved an actual discharge

[27] The above view is expressed in Cox, *Federalism in Labor Laws*, 67 Harv. L. Rev. 1297, 1325–1326.

under an existing union-security agreement and the *Farnsworth* and *Curry* cases which involved picketing for remote and uncertain objectives in a controversy over union organization.[21] All the more clearly, there is no inconsistency with the line of authorities exemplified by *Garner* v. *Teamsters Union*, 346 U.S. 485, and *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, insofar as employee and union activities are concerned.[22]

2. *The framing of divergent State remedies for the actual "execution or application" of a union security contract in violation of State law will not interfere with the national labor policy.*

The exclusivity of the jurisdiction of the National Labor Relations Board, including the exclusivity of its remedial powers, rests upon the need for ensuring that the substantive rules laid down by Congress are

[21] The holding in *Plankington Packing Co.* v. *Wisconsin Employment Relations Board*, 338 U.S. 953 (1950), that the Wisconsin Board lacked jurisdiction to remedy the discriminatory discharge of an employee employed by a company subject to the NLRA, is not inconsistent with *Algoma*. *Plankington*, unlike *Algoma*, did not involve State enforcement of its union security policy, for, although the union and the company had a maintenance of membership agreement, it was not invoked as the basis for the discharge; hence, the State action in *Plankington* was not within the area of union security which Congress had carved out for the States, but within the field preempted by the NLRA. See Brief for the National Labor Relations Board as *Amicus Curiae*, *Plankington Packing Company* v. *Wisconsin Employment Relations Board*, No. 419, October Term 1949, pp. 15–17, 24–25. See also *Bus Employees* v. *Wisconsin Board*, 340 U.S. 383, 390, n. 12 (1951).

[22] The impact of *Garner* and *Garmon*, if State law is read into the proviso to Section 8(a)(3), is discussed *infra*, at pp. 43–47.

given uniform application. As this Court declared in *Garner* v. *Teamsters Union*, 346 U.S. 485, 490:

> *Congress did not merely lay down a substantive rule* of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application *of its rules* to a specific and specially constituted tribunal * * * Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain *uniform application of its substantive rules* and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. * * * [Emphasis added.]

Thus, the doctrine of exclusive jurisdiction presupposes that the substantive law to be applied is the uniform national law prescribed by Congress.

In the field of union security, the controlling substantive regulations admittedly may be fashioned, not by Congress, but by the several State legislatures. In this area, Congress chose to do without uniformity. Section 14(b) permits the States to adopt restrictive legislation expressing a variety of local attitudes and philosophies on the subject of compulsory unionism. Making the exception may tend to impair other parts of the national labor policy, but diversity in matters pertaining to union security contracts is as much a part of that policy as uniformity on other issues.

Nothing in the language or policy of the Act justifies petitioner's insistence that those diverse State policies be implemented solely (or, indeed, at all) by the specialized machinery set up by Congress to remedy

violations of its own dictates. State remedies are often more elaborate, and in some cases more severe, than those the Board would apply (Pet. Br. 11–12). But it is impossible to believe that Congress was prepared to tolerate local variations in the basic substantive law, yet was unwilling to allow diversity in the much less important matter of remedies. For whereas the substantive law may determine the way in which union security is treated in thousands of collective-bargaining contracts, the remedies are called into play only in the comparatively rare instances in which a violation is established.

Moreover, petitioner's argument depends upon a wholly artificial divorcement of the remedial from the substantive. There is no federal policy in favor of the use of cease-and-desist orders in the abstract, but only as a means for curing violations of the particular substantive prohibitions which Congress laid down in the National Labor Relations Act. By parity of reasoning, where the substantive rules to be applied are those of the States, it is reasonable to conclude that State remedies and procedures should be the means of enforcement.

3. *Even if contracts which violate State right-to-work laws are automatically federal unfair labor practices, concurrent State jurisdiction would not unduly interfere with the Board's administration of Sections 8(a)(3) and 8(b)(2)*

In part II, *infra*, we discuss the question whether conduct which violates a State right-to-work law automatically becomes a federal unfair labor practice under Sections 8(a)(3) and 8(b)(2). We there conclude that the requirements of State law should not be

read into the proviso to section 8(a)(3) and that the jurisdiction of State tribunals to enforce State right-to-work prohibitions should be exclusive. We now demonstrate that, even if a union security contract banned by the State does lose the protection of the proviso and thereby come within the cognizance of the Board, the exercise of concurrent jurisdiction by State courts would not unduly impede the Board's administration of sections 8(a)(3) and 8(b)(2).

Although the danger of diverse or conflicting adjudications upon identical facts is ordinarily to be avoided, a ruling that a union-security contract which violates State law is not privileged for the purposes of Sections 7 and 8 would not compel the conclusion that Congress intended to deprive the States of jurisdiction to enforce the right-to-work laws which it concededly left them power to enact.

The exercise of concurrent jurisdiction by State courts over conduct which might also fall within the Board's domain is not so unusual a departure from the general scheme of the Act as to cast doubt upon the existence of that jurisdiction in the present instance. It is well settled, for example, that State courts, applying State tort law or criminal statutes, may enjoin, exact damages, or impose penalties for conduct which involves violence or threats of violence, even though the same conduct would also constitute an unfair labor practice under Section 8(b)(1)(A).[30]

[30] It may also be noted that, under Section 14(c), the States may apply their own laws to businesses over which the Board, for policy reasons, declines to assert jurisdiction. In these instances, there is no concurrent jurisdiction, the Board in effect having ceded its power over the subject to the States.

United Construction Workers v. *Laburnum Construction Corp.*, 347 U.S. 656; *Youngdahl* v. *Rainfair, Inc.*, 355 U.S. 131. Similarly, a person injured as a consequence of secondary activity banned by the federal Act may recover damages in either a State or federal court under Section 303 even though the Board would also have jurisdiction to administer a remedy for the same conduct under Section 8(b)(4). *Longshoremen's & Warehousemen's Union* v. *Juneau Spruce Corp.*, 342 U.S. 237. Moreover, both State and federal courts have power to adjudicate controversies involving the breach of collective-bargaining agreements, notwithstanding that the offending conduct would also amount to a violation of the Act. *Smith* v. *Evening News Assn.*, 371 U.S. 195. In all of these situations, the aggrieved party has a choice between bringing suit in a State (or federal) court or lodging a complaint with the Board, or both. In each case the outcome, as well as the remedy, may be different, depending on which tribunal is selected. If the controversy is brought before both forums, either by the same or different grievants, there may in some circumstances be conflicting results or cumulative remedies. In the case of "violence," moreover, there are the additional possibilities that the State court might restrain conduct which the Board would protect, or might impose sanctions more severe than those the Board, or another State court, would be empowered or disposed to apply.

In the face of these examples, the possibility of inconsistent or diverse findings in a controversy over a union-security contract is not persuasive that Con-

gress, despite all the history to the contrary, must have intended to have deprived the States of power to apply State remedies for violations of applicable State law.

II

THE EXECUTION AND APPLICATION OF A COLLECTIVE BARGAINING AGREEMENT THAT SATISFIES THE CONDITIONS OF THE PROVISO TO SECTION 8(a)(3) IS NOT A FEDERAL UNFAIR LABOR PRACTICE EVEN IF IT VIOLATES STATE LAW

The normal rule where State and federal governments have concurrent powers of regulation is that each enacts and administers its own law. One would suppose that if Congress had wished to establish a different arrangement for dealing with union-security contracts it would have expressed that novel intention in plain words.

The spontaneous understanding of Section 14(b), however, is only that it prevents any employer or labor union from defeating the normal application of a State law prohibiting union-security agreements by claiming that the agreement was "authorized" by federal law. There is no intimation that it affects the federal unfair labor practices.

That reading is confirmed by the legislative history. (See pp. 16–26, *supra*.) The choice of "authorized," as explained *supra*, pp. 14–15, is readily explained by the reasoning in *Hill* v. *Florida* and the fact that section 9(e)(1) of the Taft-Hartley Act originally directed the Board to conduct elections to determine whether a majority of the employees desired "to authorize" the bargaining representative to negotiate a

union-security agreement. The natural place to put any qualification requiring a contract to comply with State law in order to satisfy the proviso to Section 8(a)(3) was in the proviso itself.

We must concede, nevertheless, that the words will bear the construction that makes a discharge under a union shop contract that violates State law, but otherwise satisfies the proviso to section 8(a)(3), a federal unfair labor practice. Section 7 describes agreements qualifying under the proviso as "authorized in section 8(a)(3)." Hence, when Section 14(b) states that nothing shall be deemed as "authorizing" such contracts where prohibited by State or Territorial law, it may mean that they are not "authorized" for the purposes of Sections 7, 8(a) (1) and (3), and 8 (b)(2). There is no inconsistency between that interpretation and the additional conclusion that under such circumstances the contracts are not "authorized," in the sense that they are not protected against prosecution by the State.

Moreover, the view that a federal unfair labor practice is created would benefit individual employees aggrieved by violation of State right-to-work laws by making the services of the National Labor Relations Board available as investigator and prosecutor without private expense.

It is also plain that there are other occasions upon which the Board is required to take State law into account in deciding whether an employer's or union's conduct is an unfair labor practice. For example, where an employer is charged under Section 8(a)(5) with a refusal to bargain in good faith about a union-

shop clause, it may be a complete defense that the proposed agreement is proscribed by a State right-to-work law. "[I]t is not incompatible with good faith in bargaining," to refuse to discuss a contract provision which the employer justifiably feels might bring him "into conflict with the State legal authorities." *Fort Industry Co.*, 77 N.L.R.B. 1287, 1299[11] (1948). A union which goes on strike to enforce its demand for a union shop prohibited by State law—a subject which, as indicated, is non-bargainable—may well be guilty of a refusal to bargain under Section 8(b)(3). For "good faith does not license [a party to collective bargaining] to refuse to enter into agreements on the ground that they do not include some proposal which is not a mandatory subject of bargaining." *National Labor Relations Board* v. *Borg-Warner Corp.*, 356 U.S. 342, 349. An employer accused of violating Section 8(a)(1) by discharging an employee for participation in a strike to secure an impermissible union-shop agreement may perhaps exculpate himself by showing that the strike sought to compel him to engage in an act illegal under State law, for the objective might well deprive the employee's conduct of the status of protected "concerted activity" under Section 7 and thereby exonerate the employer under Section 8(a)(1). See Cox, *The Right To Engage in Concerted Activity*, 26 Ind. L. J. 319, 341–343.

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[11] Presumably, the ruling depends upon the precise facts. If the union contends in good faith that the proposed contract is not illegal, the employer could hardly excuse an outright refusal to discuss the question.

However, such situations are quite unlike the instant case. In each of the foregoing instances there would be the same necessity for taking State law into account if the union's demand were for a very different kind of provision illegal under a State statute, such as a clause guaranteeing men a wage differential for the same work as women in violation of an equal pay law, or a seniority system discriminating against men over 60 years of age in violation of a statute prohibiting discrimination because of age against men under 65. State laws provide part of the context of substantive regulation of terms and conditions of employment within which the employer and union conduct their relations. In the examples cited, the Board merely takes that context into account in applying, to the particular facts before it, such uniform federal concepts as "concerted activities" and "bargain in good faith." The Board neither has nor exercises power directly to deal with violations of State laws as unfair labor practices; consequently, the analogies do not support the view that it is given that assignment in the case of State right-to-work laws by Sections 14(b) and 8(a)(3).

In *Giant Food Shopping Center, Inc.*, 77 N.L.R.B. 791, the National Labor Relations Board did indeed hold that it would not conduct a union authorization election under Section 9(e)(1) in a bargaining unit covering two States, one of which had enacted a right-to-work law. The Board's principal reason for reaching this conclusion was that an election, the sole purpose of which was to authorize the union to negotiate

a union-shop contract, would not only "serve no useful purpose" but "would lead only to the circumvention and frustration of State law, a result that Congress clearly did not intend as evidenced by its enactment of Section 14(b)." *Id.* at 795. Elsewhere in the opinion (pp. 794–795), however, the majority said that—

> if the employer and the union, acting pursuant to the authority conferred by a Board-conducted union-shop election, should enter into a union-shop agreement notwithstanding the prohibitions of a State law, the Board might well be placed in the position of having to accept the union-shop agreement as a defense to an unfair labor practice complaint alleging discriminatory discharges in violation of the Act. * * *

And Chairman Herzog, with whom Member Houston concurred in dissent, taxed the Board with having held that (pp. 797–798)—

> a State offense becomes, *ipso facto*, a Federal offense. Any employer who discharges an employee within a prohibiting State pursuant to a union-shop agreement, and any labor organization that contributes to that result, not only violates the State enactment but also violates Sections 8(a)(3) and 8(b)(2) of the Labor-Management Relations Act, simply because this Board, by declining to conduct a referendum pursuant to Section 9(e) of that Act, makes it impossible for them to put themselves in compliance with Federal law. * * *

The *Giant Food* case comes closest of all the Board's decisions to holding that the proviso to Section 8(a)(3) is inoperative in States which have prohibited union-security contracts, and thus leaves any discharge pursuant to such a contract unlawful under Section 8(a) (1) and (3) and Section 8(b)(2).[na] The decision is not a precedent for that conclusion, however, both because it was enough for the purposes of the case to hold that the Board would not make its processes available under Section 9(e)(1) where the only effect could be a violation of State law, and because the requirement of holding a union authorization election in order to satisfy the proviso, has since been repealed. Act of October 22, 1951, 65 Stat. 601.

Although the Board has never passed upon the question in a contested case, we are persuaded that conduct which violates a State right-to-work law but fully complies with the national labor policy would not be an unfair labor practice under Sections 8(a) (1) or (3) or Section 8(b)(2). The accepted practice of using the processes of the Board to enforce federal policy and leaving the enforcement of State right-to-work laws to the States is supported by a number of cogent considerations:

(i) It is inherently unlikely that Congress would have wished to make the federal agency an instrument of State policy. The Board was created for the purpose of interpreting and carrying out uniform national policy. Cf. *Labor Board* v. *Hearst Publications, Inc.*, [redacted] 322 U.S. 111. It was not estab-

[na] See, however, *Northland Greyhound Lines*, 80 NLRB 288, *Western Electric Co.*, 84 NLRB 1019, *Cyclone Sales Co.*, 115 NLRB 431, 432.

lished for the purpose of implementing, either alone or concurrently, the diverse labor policies of the States. The union shop and the agency shop do not contravene any substantive federal policy; Congress made no judgment that those arrangements were undesirable. On the contrary, the proviso clearly disclaims a policy hostile to forms of compulsory unionism other than the closed shop. And while it left the door open to the States to adopt more restrictive policies, there is no reason to suppose that Congress intended the centralized machinery of the NLRB to become the instrument of policies that it had determined to reject. Accordingly, for the Board to act as an enforcement agency for State laws which go farther than the federal law in restricting the union and agency shops would be to undertake a role entirely alien to its normal function under the Act. Nor would it leave the federal government merely indifferent with respect to right-to-work laws. The addition of federal administration and federal sanctions would give them respectability and support in place of toleration.

(ii) Nothing in the legislative history indicates that Congress intended to put federal sanctions behind State laws. Under the Wagner Act it was plain, as petitioner concedes (Br. p. 25), that State law could not possibly be read into the proviso, because there was no provision like Section 14(b). The Board enforced the national policy. State laws dealing with union security were administered by the States. Had a change been intended, it would have attracted some comment. On the Senate side, however, Senator Taft, as we have seen (*supra*, p. 24), stressed that

Section 14(b) did nothing more than make explicit what was already implicit in the Wagner Act—"that the proviso in Section 8(3) was not intended to override State laws regulating the closed shops" (*i.e.*, union-security agreements). The Senate had not thought it necessary to include such a provision in its own bill, and Senator Taft assured his colleagues that "in putting in this express provision from the House bill, we in no way change the bill as passed by the Senate * * * (*supra*, pp. 24–25).

Section 8(d)(4) of the House bill, the original version of the amendment banning the closed shop but permitting the union shop, did specifically provide that union shop agreements "shall not constitute or be evidence of an unfair labor practice * * * (if such provisions are not in conflict with the law of any State in which the agreement is to be carried out.)"[28] Commenting on this provision, the House Report stated:[29]

> The bill bans the closed shop. Under carefully drawn regulations it permits [the union shop]. Such agreements are lawful, however, only if the employees by secret ballot have selected the union as their bargaining agent, and if the majority of all the employees, by a separate secret ballot, authorize the union to enter into the agreement, *and if the agreement is not prohibited by State law.* [Emphasis added.]

---

[28] Section 8(d)(4) of H.R. 3023, 80th Cong., 1st Sess., 1 Leg. Hist. (1947) 183–184.

[29] H. Rept. No. 245, 80th Cong., 1st Sess., 9, 1 Leg. Hist. (1947) 300. See also *id.* at 34, 1 Leg. Hist. (1947) 325.

Under that bill compliance with State law would undoubtedly have been necessary to gain the benefit of the proviso.

But the Congress did not adopt Section 8(d)(4) as drafted in the House; it chose instead the language from the Senate bill that is now found in Section 8(a)(3). The House Conference Committee report explains the choice on other grounds,[34] but the failure to follow the example of the House bill by including a reference to legality under State law in the proviso itself—the obvious place for it—confirms the inference that none was intended. Section 14(b) replaced Section 13 of the House bill, which was aimed only at ensuring State jurisdiction over union-security agreements even in industries affecting commerce. Both the House and Senate explanations speak only of the intent to preserve State jurisdiction. See pp. 20–26, *supra*.

(iii) The compelling evidence (pp. 16–26; *supra*) that Congress intended the States to have jurisdiction to enforce their own laws prohibiting union-security agreements adds strength to the foregoing considerations. Whatever advantages might be claimed for having State prohibitions enforced exclusively by a centralized federal agency, are absent if the State courts have current power to adjudicate controversies involving union-security agreements. Indeed, on the latter assumption, it is difficult to see what conceiv-

[34] The Report states that the language of the Senate provision was adopted because it contained a procedure for securing the union shop which was deemed preferable to that contained in the House bill. H. Conf. Rep. No. 510, 80th Cong., 1st Sess. 41, 1 Leg. Hist. (1947) 545. See also pp. 50–51 of that Report, 1 Leg. Hist. (1947) 554–555.

able objective of national labor policy would be served by adding the sanctions of the Board to sanctions already available in the State courts for the enforcement of State laws more restrictive than national policy. Concurrent jurisdiction would inevitably give rise to the possibility of diverse or conflicting adjudications on the same facts. That consideration is hardly decisive, but in the absence of compelling evidence, either in the language or history of the Act, that Congress intended the Board to have jurisdiction, wise policy requires avoiding the possibilities of conflict. Since Congress clearly intended the States to have jurisdiction, conflict can be minimized only by the Board's confining itself to enforcement of the direct federal prohibitions.

CONCLUSION

For the reasons stated, the judgment of the court below should be affirmed.

Respectfully submitted.

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SEPTEMBER 1963.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

SEC. 8. (a) It shall be an unfair labor practice for an employer—

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bar-

gaining unit covered by such agreement when made, and if, following the most recent election held as provided in section 9(e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement:[1] *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) * * *

SEC. 9(e):

(1) Upon the filing with the Board by a labor organization, which is the representative of employees as provided in section 9(a), of a petition alleging that 30 per centum or more of the employees within a unit claimed to be appropriate for such purposes desire to authorize such labor organization to make an agreement with the employer of such employees requiring membership in such labor organization as a condition of employment in such unit,

[1] This provision was modified in 1951; 61 Stat. 144.

upon an appropriate showing thereof the Board shall, if no question of representation exists, take a secret ballot of such employees, and shall certify the results thereof to such labor organization and to the employer.

(2) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8(a)(3)(ii), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit, and shall certify the results thereof to such labor organization and to the employer.[1]

* * *

SEC. 14. * * *

(b) Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

[1] This provision was modified in 1951, 61 Stat. 144.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 13

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL 1625, ET AL., *Petitioners*,

v.

ALBERTA SCHERMERHORN, ET AL., *Respondents*.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF OF THE STATE OF FLORIDA, AS AMICUS CURIAE, JOINED AND SUPPORTED BY THE STATES OF ARIZONA, GEORGIA, IOWA, KANSAS, MISSISSIPPI, NEBRASKA, NEVADA, NORTH CAROLINA, NORTH DAKOTA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VIRGINIA, WISCONSIN, AND WYOMING

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QUESTION PRESENTED ON REARGUMENT

Whether State Courts have jurisdiction to enforce a remedy for violation of State Right to Work Laws.

STATEMENT OF THE CASE

On June 3, 1963, this court held that Agency Shop Agreements are subject to state prohibition under section 14(b) of the National Labor Relations Act, but left for reargument the question of whether the enforcement of such a state prohibition must, in the light of the exclusive federal pre-emption doctrine,[1] be enforced by the National Labor Relations Board rather than the state courts.

This question is raised, the court pointed out, because of the interrelation between section 8(a)(3) of the National Labor Relations Act, which contains a proviso authorizing agreements conditioning employment upon "membership" in a labor union, and section 14(b) which reserves to the states the authority to prohibit such agreements. Without the proviso to 8(a)(3), the court noted, to condition employment upon union membership would be an obvious unfair labor practice under the Act, and if the effect of section 14(b) is to nullify the 8(a)(3) proviso in Right to Work states, such agreements would then become federal unfair labor practices as well as violations of the state law. In such event, the court observed, "the obvious question is precipitated as to whether a state, as well as the Board, may enjoin such union security agreements." On the other hand, the court noted, if section 14(b) and state Right to Work laws are regarded as having no impact on section 8(a)(3) at all, the pre-emption question is not presented.

The Retail Clerks International Association, petitioner herein, urges the first alternative conclusion, namely, that a state Right to Work law nullifies the section 8(a)(3) proviso, thereby making a compulsory unionism agreement a federal unfair labor practice within the exclu-

[1] *Garner* v. *Teamsters Union*, 346 U.S. 485; *San Diego Building Trade Council* v. *Garmon*, 359 U.S. 354.

sive jurisdiction of the National Labor Relations Board. Any attempt by a state court to enforce the state Right to Work law, the Union contends, would constitute an unconstitutional interference with federal authority under the *Garner* and *Garmon* rule.

SUMMARY OF ARGUMENT

To deny a state the authority to enforce its own validly enacted laws is wholly without precedent, and is repugnant to all recognized concepts of jurisprudence, and to our constitutional system. It is illogical in the extreme to contend that while the State of Florida has authority to adopt its Right to Work amendment, and while this amendment represents a valid exercise of state authority not in conflict with federal policy, yet, the state is powerless to enforce this law through its own courts.

Whether a state Right to Work law nullifies the section 8(a)(3) proviso, and thereby converts an otherwise permissible compulsory unionism agreement into a federal unfair labor practice is purely a matter of legalistic hair-splitting. Whether it does or does not, is not decisive to the question of state authority to enforce Right to Work laws in view of the overwhelmingly clear congressional intent in the Taft-Hartley Act to leave undiminished state authority to prevent compulsory unionism. The most logical conclusion is that a state Right to Work law has no effect whatsoever upon the National Labor Relations Act, since it does not change the declared federal policy of "nonhostility"[2] toward union security agreements. Its effect is simply to make a union security agreement unlawful in the particular state under state law. The state policy is thus independent of the federal policy and

[2] *Algoma Plywood & Veneer Co.* v. *Wisconsin Board*, 336 U.S. 301 (1949), held that section 8(3) of the National Labor Relations Act "merely disclaims a national policy hostile to" union security agreements.

can be regarded as having no impact whatever upon the section 8(a)(3) proviso.

Congress, in enacting the Taft-Hartley Act amendments to the National Labor Relations Act, never contemplated or intended that the states would be ousted of jurisdiction to enforce their Right to Work laws. The legislative history of the act shows that Congress intended exactly the contrary, and expressly indicated that federal enforcement authority should not displace state authority.

The argument made by petitioner that federal preemption is necessary to preclude a conflict in legal remedies, if not legal policy, is an artificial one. Even if, as contended by petitioner, a union security agreement in a Right to Work state is to be regarded as a federal unfair labor practice there is no logical reason why exclusive jurisdiction must be vested in the Federal Board. Concurrent federal and state jurisdiction is not incompatible with the congressional design embodied in the National Labor Relations Act, and has been recognized and applied in respect to numerous other aspects of labor management activities affecting interstate commerce, under this statute as well as others.

To hold that a state must yield its enforcement power to a federal administrative agency is to carry the federal pre-emption doctrine to the borders of absurdity. It represents a species of legal absolutism not dictated by practical and legitimate reasons, but rather by a doctrinaire notion as to the exclusivity of National Labor Relations Board jurisdiction, and blind insistence that such exclusivity must be preserved regardless of the consequent destruction of the traditional and historical right of the states to enforce their own laws.

ARGUMENT

I. State Right to Work Laws have no impact on Federal Policy toward compulsory unionism.

The structure of the National Labor Relations Act clearly shows that the federal policy permitting union security agreements and state policies restricting such agreements were designed to have separate and independent application at their respective levels.

The proviso in section 8(a)(3) was inserted for the sole purpose of making it clear that union shop agreements are not regarded as unfair labor practices. As was stated in *Algoma* in respect to section 8(3) of the original Wagner Act, this proviso "disclaims a national policy hostile to" union security agreements. The interpretation of the original section 8(3) in *Algoma* is still of vital importance because, save in details not here pertinent, it was framed in substantially the same way as the revised section. The wording of both provisions is essentially the same in that after prohibiting compulsory union membership in general terms, they created an exception to the general rule. The exception in the one statute is different in some details from the exception in the other. But the broad plan, the general scheme of enacting the prohibition and then creating an exception is substantially the same in each instance. In both cases there is a prohibition of compulsory union membership; in both cases there is the exception providing that nothing in the principal act or any other federal act shall preclude the making of the excepted form of agreement. Accordingly, in so far as federal policy is concerned, a union security agreement meeting the requirements of section 8(a)(3) was declared not an unfair labor practice.

Petitioner now contends that what Congress declared not an unfair labor practice at the time it passed the act may later be made a federal unfair labor practice by ac-

tion of a state Right to Work law. In other words, the state law has the effect of completely reversing the federal policy on union security agreements and creates a federal unfair labor practice where none existed before.

This result is not logically consistent with established principles recognized by this court. It has repeatedly been held that the states may not interfere with, obstruct, or otherwise hinder federal policy. How then can it be said that a state law in this instance completely reverses the federal policy on compulsory unionism agreements? It is much more reasonable and logical to hold that federal policy remains what it was at the time Congress enacted the Taft-Hartley Act amendments in 1947, and that state laws prohibiting such agreements do not change such policy but are to be applied completely independently of the federal policy.[3]

The precise question of whether a state court may enforce a state law restricting compulsory unionism has already been answered by this court in *Algoma*, which involved an order of the Wisconsin Employment Relations Board directing an employer to reinstate with back pay an employee discharged for non-membership in a union in violation of the Wisconsin Employment Peace Act. "At every stage of the proceedings," the court noted, "the company and the union contested the jurisdiction of the Employment Relations Board, on the ground of the exclusive authority of the National Labor Relations Board under section 10 of the National Labor Relations Act." After an exhautive analysis of the section 8(3)

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[3] The very wording of the section 8(a)(3) proviso compels this conclusion. The explicit words *"nothing in this act,* or in any other statute of the United States, shall preclude an employer from making an agreement with any labor organization * * * to require as a condition of employment membership therein * * *" (Emphasis added) precludes any assumption that section 14(b), or any state law adopted thereunder, makes any such agreement an unfair labor practice under the federal law.

proviso in the original National Labor Relations Act and its legislative history the court concluded that it was not the intent of Congress to deny to the state of Wisconsin the right to enforce its own more restrictive statute. The court then proceeded to discuss whether the Taft-Hartley Act amendments would require any different result. In passing upon this question the court stated:

> "Section 10(a) of the Taft-Hartley Act, which is set forth in the margin, contains important changes, but none requiring modification of the conclusions we have reached as to the corresponding section of the National Labor Relations Act.
>
> • • • • •
>
> "Other provisions of the Taft-Hartley Act make it even clearer than the National Labor Relations Act that the States are left free to pursue their own more restrictive policies in the matter of union-security agreements. Because § 8(3) of the new Act forbids the closed shop and strictly regulates the conditions under which a union-shop agreement may be entered, § 14(b), was included to forestall the inference that federal policy was to be exclusive."

On the basis of this very clear exposition of the congressional intent, the court concluded that the Wisconsin courts and the Wisconsin Employment Relations Board had full authority to issue enforcement orders under the statute.

Decisions subsequent to *Algoma* have similarly upheld authority of state courts to enforce state restrictions on compulsory unionism. *Plumbers Local Union No. 10* v. *Graham*, 345 U.S. 192 (1953), involved the propriety of an injunction order issued by a state court in Richmond, Virginia enjoining union picketing which had for its admitted purpose the dismissal of non-union employees from a construction project in violation of the Virginia Right to Work law. The court after reviewing the evidence upon which the trial court had based its finding as

to the purpose of the picketing, affirmed the judgment of the lower court. In *Willard* v. *Huffman*, 250 N.C. 396, 109 S.E. 2d 233 (1959) the Supreme Court of North Carolina sustained an award of damages to an employee discharged for non-membership in a union in violation of the North Carolina Right to Work law. The defendant employer contended that the discharge was an unfair labor practice under section 8(a)(3) of the National Labor Relations Act and thus subject to exclusive jurisdiction of the National Labor Relations Board. After reviewing the entire range of pre-emption cases under the National Labor Relations Act the North Carolina Supreme Court stated:

> "Our courts, in the case before us, are not seeking to administer the provisions of section 8(a)(1) and (3) of the Labor Relations Act, Title 29, USCA; they seek only to enforce the provisions of our own Right to Work Act, provisions which have no counterpart in the National Labor Relations Act. * * * As heretofore pointed out, our Right to Work Act has been held to be constitutional by this court and by the Supreme Court of the United States in *Whitaker* v. *State of North Carolina*, [335 U.S. 525]."

A petition for certiorari filed by the defendant employer seeking review of the decision of the North Carolina Supreme Court was denied by this court. 361 U.S. 893 (1959).

The obvious difference between these cases and *Electrical Workers* v. *Farnsworth & Chambers*, 353 U.S. 969 (1957) (per curiam); *DeVries* v. *Baumgartner Electric Co.*, 359 U.S. 498 (1959) (per curiam) and *Construction and General Laborers Union* v. *Curry*, 371 U.S. 542 (1962), wherein this court reversed state court injunctions issued ostensibly to prevent violations of Right to Work laws, is that in each of the latter cases the union conduct enjoined by the state court was such as to constitute unfair labor practices independent of any ques-

tion of the state Right to Work laws. In each case, it will be noted, the unions' petition for certiorari was based upon the assertion that the state court had improperly concluded that the purpose of the picketing was to enforce union demands which contravened state policy against compulsory unionism. In each case, moreover, the injunction order issued by the state court went considerably beyond the restriction of activities designed to bring about compulsory unionism, and broadly enjoined union picketing and related activities regardless of purpose. This, as can be seen, is quite a different state of affairs than a situation where, as in *Willard* v. *Huffman*, supra, a state court undertakes to remedy the dismissal of an employee from his job because of non-membership in a union. In such case the only question present is whether the employee was unlawfully discharged in violation of the state law. There is no question of any union conduct which might have other purposes or other effects. Similarly, in *Plumbers Union* v. *Graham*, supra, the state court had before it facts which pinpointed the union conduct as being for the sole and admitted purpose of forcing the discharge of non-union workers, and, on that basis, the authority of the state court to restrain such conduct was upheld.

In the instant case the action was originally brought by the plaintiff-employees in the Florida court for the purpose of preventing their discharge for nonpayment of union dues and fees. The case involved no union picketing or strike or any other course of action that could independently be said to be an unfair labor practice under section 8. It is thus clear that there is no similarity whatever between this situation and the situations present in the *Farnsworth*, *DeVries*, and *Curry* cases.

Petitioner relies heavily upon *United States* v. *Sharpnack*, 355 U.S. 286 (1958) as support for its contention that by operation of section 14(b) state Right to Work

laws are absorbed into section 8(a)(3), and any violation of a Right to Work law thereby becomes an unfair labor practice under the federal act. As can be seen this is a rather farfetched analogy. The *Sharpnack* case did not involve any question as to whether federal enforcement functions displaced state enforcement authority, but a completely unrelated question as to whether Congress in the Assimilative Crimes Act, 1948, could properly adopt state criminal statutes enacted subsequent to that time. In answering this question in the affirmative the court pointed out that there was a clearly expressed congressional intent to make unlawful under federal law, any conduct in a federal enclave which would be a crime under the law of the particular state. This provides no analogy to the National Labor Relations Act, however, because there is nowhere in that act an expressed congressional intent to make unlawful under federal law any conduct unlawful under state Right to Work laws. Congress could have provided that a violation of any such state laws would constitute an unfair labor practice under the federal act, but Congress has not in fact done ary such thing.

II. Congress never intended that the States would be deprived of jurisdiction to enforce their Right to Work laws.

The legislative history of the Taft-Hartley Act contains clear evidence that Congress intended that the states should have power to enforce, as well as enact, restrictions on compulsory unionism. House Conference Report No. 510 on H.R. 3020 stated, for example:

> "It was never the intention of the National Labor Relations Act, as is disclosed by the legislative history of that act, to preempt the field in this regard so as to deprive the States of their powers to *prevent* compulsory unionism. * * * To make certain that there should be no question about this, section 13

> was included in the House bill. The Conference agreement, section 14(b), contains a provision having the same effect." 1 Legis. Hist. 564. (Emphasis added.)

In explaining the Conference approved bill Senator Taft pointed out that the section 8(3) proviso in the original Wagner Act did not in any way limit state "enforcement" of laws prohibiting compulsory unionism, and that the amendments to section 8(3) were not intended to change this situation. He stated:

> "In other words, the whole spirit of the Wagner Act and its provisions would prohibit a closed shop, because it prohibits discrimination against people who are not members of labor unions. In order to preserve that right and to keep the Wagner Act itself from abolishing the closed shop everywhere, it was necessary to write in this proviso. But that did not in any way prohibit the *enforcement* of State laws which already prohibited closed shops.
>
> "That has been the law ever since that time. It was the law of the Senate bill; and in putting in this express provision from the House bill, we in no way change the bill as passed by the Senate of the United States." 2 Legis. Hist. 1597. (Emphasis added.)

The use of the words "to prevent compulsory unionism" and "the enforcement of state laws," in relation to the scope of state authority under section 14(b) points to the obvious conclusion that Congress intended no limitation on state power to enforce Right to Work laws.

Whether Congress intended to make state enforcement jurisdiction exclusive is not entirely clear, however, because of a number of references to concurrent state and federal jurisdiction in the portions of the legislative history dealing with the amendments to section 10(a), the section which expressly vests jurisdiction in the National Labor Relations Board to prevent unfair labor practices.

As set forth in the original Wagner Act this section provided as follows:

> "Section 10(a)—Prevention of Unfair Labor Practices. The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. Such power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise."

H.R. 3020 as it passed the House retained in section 10(a) the words "such power of the Board shall be exclusive." House Report No. 245 on H.R. 3020 in discussing section 10(a) stated:

> "As under the present act, the power of the Board under the amended act in the matter of unfair labor practices is exclusive. This rule necessitated a special provision (section 13 hereinafter discussed) to give to the states a *concurrent jurisdiction* in respect of closed shop and other union security arrangements." 1 Legis. Hist. 331. (Emphasis added.)

The language of section 10(a) as passed by the Senate contained the language of the original Wagner Act with the exception that the words "such power of the Board shall be exclusive" were stricken. The bill as finally passed by both Houses adopted the Senate version of section 10(a). The Conference Report explained the purpose of the new section 10(a) as follows:

> "The Senate amendment, because of its provisions authorizing temporary injunctions enjoining alleged unfair labor practices and because of its provisions making unions suable, omitted the language giving the Board exclusive jurisdiction of unfair labor practices, but retained that which provides that the Board's power shall not be affected by other means of adjustment or prevention. The conference agreement adopts the provisions of the Senate amendment. By retaining the language which provides the Board's powers under section 10 shall not be affected by other

means of adjustment, the conference agreement makes clear that, when two remedies exist, one before the Board and one before the courts the remedy before the Board shall be in addition to, and not in lieu of, other remedies." 1 Legis. Hist. 556.

House Report No. 245 on H.R. 3020 in explaining the section of that bill (section 8(d)(4)) which was the counterpart of section 8(a)(3) as finally adopted explained:

> "Agreements such as those that section 8(d)(4) permits are valid only if they are valid under the laws of any State in which they are to be performed, and by section 13 the United States expressly declares the subject of compulsory unionism *one that the States may regulate concurrently with the United States*, notwithstanding that the agreements affect commerce, and notwithstanding that the State laws limit compulsory unionism more drastically than does Federal law." 1 Legis. Hist. 325. (Emphasis added.)

In spite of this clear legislative record, petitioner states in its brief, "there is not a scintilla of probative evidence that Congress intended to unleash the grave consequences of concurrent state court jurisdiction on labor relations in interstate commerce." The above-quoted sections of the legislative record provide far more than a "scintilla of evidence," and, in fact, conclusively show that Congress in reserving to the states authority to adopt laws prohibiting compulsory unionism, had no intention of depriving them of their authority to enforce such laws.

III. State Court remedies do not interfere with National Labor Policy or Board Administration

Notwithstanding that state Right to Work laws do not in themselves conflict with federal policy, petitioner contends that the application of divergent remedies by state courts would interfere with federal policy and administration. Petitioner points out that state courts may apply civil remedies by way of injunctions or damages, or crim-

inal penalties by way of fines or imprisonment, whereas the remedies applied by the National Labor Relations Board consist of cease and desist orders and orders directing reinstatement, with or without back pay. Such divergency of remedies, petitioner asserts, were condemned by this court in *Garner* as incompatible with the scheme of the federal act.

What was said in *Garner* on this subject, however, was in quite a different context. There the conduct enjoined by the state court was clearly an unfair labor practice under section 8 and within the scope of NLRB enforcement jurisdiction. The plaintiff employer brought the action in the state court in Pennsylvania, a non-Right to Work state, to restrain union picketing which sought to compel him to recognize the union and to force his employees to join the union. In spite of the admitted existence of an unfair labor practice under the federal law, the employer argued that the equity powers of the state court could be invoked to enforce state protected private rights as distinguished from the public rights which the National Labor Relations Board enforces in the public interest. In rejecting this argument, the court stated that even if distinctly private rights were enforced by the state authorities the conflict lies in remedies, not rights, since the same picketing may injure both public and private rights.

The considerations thus applicable in that case are not applicable here, since we are here dealing with different statutory provisions and with a different factual situation. Where *Garner* involved an evident unfair labor practice under the federal act, we are here dealing with union security agreements toward which Congress has expressed a policy of non-hostility and with respect to which no federal sanctions or remedies were intended. Here, also, we have a definite expression of congressional intent to permit state action "notwithstanding that the

state laws limit compulsory unionism more drastically than does federal law." 1 Legis. Hist. 325.

There are various other respects in which the National Labor Relations Act itself permits state court remedies for conduct which is clearly within the range of NLRB jurisdiction. For example, section 303 of the Taft-Hartley Act authorizes damage actions in state courts based upon union unfair labor practices arising out of secondary boycotts and jurisdictional disputes under section 8(b)(4) of the act.[4] Section 301 of Taft-Hartley authorizes state court breach of contract suits by and against labor organizations even though the conduct complained of is, not only arguably, but concededly, an unfair labor practice within the jurisdiction of the National Labor Relations Board.[5] Section 14(c)(2) authorizes state courts and agencies to exercise jurisdiction over unfair labor practices affecting commerce wherever the National Labor Relations Board has declined to assert or exercise jurisdiction.[6] Congress has authorized the Waterfront Commission of New York to exercise jurisdiction over union activities which clearly come within the protection of the National Labor Relations Act, and to apply divergent remedies. *DeVeau* v. *Braisted*, 363 U.S. 144 (1960). As there stated by the court:

> "The doctrine of pre-emption does not present a problem in physics but one of adjustment because of the interdependence of federal and state interests and of the interaction of federal and state powers. Ob-

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[4] *Longshoreman's Union* v. *Juneau Spruce Corp.*, 342 U.S. 237 (1952)

[5] *Smith* v. *Evening News Assn.*, 371 U.S. 195 (1962)

[6] "Section 14(c)(2) Nothing in this Act shall be deemed to prevent or bar any agency or the courts of any state or territory (including the Commonwealths of Puerto Rico, Guam, and the Virgin Islands) from assuming and exerting jurisdiction of labor disputes over which the Board declines, pursuant to Paragraph (1) of this subsection, to exert jurisdiction."

viously the National Labor Relations Act does not exclude every state policy that may in fact restrict the complete freedom of a group of employees to designate representatives of their own choosing. For example, by reason of the National Labor Relations Act a state surely is not forbidden to convict and imprison a defendant in a criminal case merely because he is a union official and therefore could not serve as a bargaining representative."

In *United Construction Workers* v. *Laburnum*, 347 U.S. 656 (1954) the authority of a state to apply remedies different from those applied by the Board was expressly upheld. There a state court awarded damages to an employer arising out of union picketing which was clearly an unfair labor practice under the federal act. The defendant union relied upon *Garner* in contending that the state court was without authority to apply remedies divergent from those available through the NLRB. The court in rejecting this argument distinguished the *Garner* case, as follows:

"In the Garner case Congress had provided a federal administrative remedy, supplemented by judicial procedure for its enforcement, with which the state injunctive procedure conflicted. Here Congress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct. For us to cut off the injured respondent from this right of recovery will deprive it of its property without recourse or compensation. To do so will, in effect, grant petitioners immunity from liability for their tortious conduct. We see no substantial reason for reaching such a result. The contrary view is consistent with the language of the act and there is positive support for it in our decisions and in the legislative history of the act."

In *International Association of Machinists* v. *Gonzales*, 356 U.S. 617 (1957) this court sustained an award of damages by a state court to an employee wrongfully expelled from his job for non-membership in the union.

The union, relying on *Garner*, contended that since the conduct complained of constituted an unfair labor practice under section 8 the state court had no jurisdiction to award damages. This court rejected that contention stating:

> "Since we deal with implications to be drawn from the Taft-Hartley Act for the avoidance of conflicts between enforcement of federal policy by the National Labor Relations Board and the exertion of state power, it might be abstractly justified, as a matter of wooden logic, to suggest that an action in the state court by a member of the union for restoration of his membership rights is precluded. In such a suit there may be imbedded circumstances that could constitute an unfair labor practice under section 8(b)(2) of the act. * * * To preclude a state court from exerting its traditional jurisdiction to determine and enforce the rights of union members would in many cases leave an unjustly ousted member without remedy for the restoration of his important union rights. Such a drastic result, on the remote possibility of some entanglement with the Board's enforcement of the national policy would require a more compelling indication of congressional will than can be found in the interstices of the Taft-Hartley Act. See *United Construction Workers* v. *Laburnum Construction Corp.*"

Similarly, *United Automobile Workers* v. *Russell*, 356 U.S. 634, (1957) upheld a state court award of damages to an employee who was denied access to his place of employment by a striking union. The union again relied upon *Garner*, claiming that the state courts should not be permitted to apply divergent remedies. As in *Gonzales* this court rejected the union contention stating:

> "In this case there is a possibility that both the board and the state courts have jurisdiction to award lost pay. However, that possibility does not create the kind of conflict of remedies referred to in *Laburnum*. Our cases which hold that state jurisdiction is pre-empted are distinguishable. In them we have

been concerned lest one forum would enjoin, as illegal, conduct which the other forum would find legal, or that the state courts would restrict the exercise of rights guaranteed by the Federal Acts.

"In the instant case there would be no conflict even if one forum awarded back pay and the other did not. There is nothing inconsistent in holding that an employee may recover lost wages as damages in a tort action under state law, and also holding that the award of such damages is not necessary to effectuate the purposes of the Federal Act."

United Auto Workers v. *Wisconsin Board*, 351 U.S. 266 (1956), recognized the authority of a state court to enjoin mass picketing, coercion of employees and threats of violence even though this conduct constituted an unfair labor practice under the federal act. As expressed by the court:

"The dominant interest of the States in preventing violence and property damage cannot be questioned. It is a matter of genuine local concern. Nor should the fact that a union commits a federal unfair labor practice while engaging in violent conduct prevent States from taking steps to stop the violence. This conclusion is explicit in the opinions cited in note 12." [citing *Garner*, inter alia].

It must be noted that the decision of this court in *San Diego Building Trades Council* v. *Garmon*, supra, did not overrule or otherwise disturb the rulings in *Laburnum*, *Gonzales*, *Russell*, and related cases, but rather cited these cases with approval.[7] Thus the all-inclusive condemnation of divergent state remedies which petitioner imputes to the *Garner* and *Garmon* decisions cannot really be found there.

Apart from other considerations, where is the divergency of remedies that might result from state enforcement of Right to Work laws? The most likely case where

[7] 359 U.S. 244.

the protection of the state law would be called into play is where an employee is dismissed from his job because of non-membership in a union or refusal to pay union dues or fees. In such case a state court order directing his reinstatement and recovery of lost pay is in no sense different from an NLRB order to the same effect. Or, in a case such as the present one, if an employer threatens his employees with dismissal if they fail to pay union dues and fees, a state court injunction restraining such dismissal is essentially the same remedy that the NLRB would apply by way of a cease and desist order.

In so far as state courts have authority to impose fines and imprisonment for violation of some Right to Work laws, this is unquestionably a type of sanction which goes beyond the remedies which would be applied by the Board. But it cannot be said, for that reason alone, that the state laws conflict with federal policy or federal administration, because there are no areas in which these sanctions impinge upon federal policy. As stated in *Laburnum*, supra,

> "To the extent, however, that Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that existing criminal penalties or liability for tortious conduct have been eliminated." 347 U.S. 656, 665.

See, also, *Whitaker* v. *North Carolina*, 335 U.S. 525 in which this court affirmed the conviction of appellants under a warrant charging that they had violated the state Right to Work law by entering into a closed shop arrangement.

Another point stressed vigorously by the petitioner is "the real danger of conflicting findings on the same facts" if the states and the National Labor Relations Board were to have concurrent jurisdiction of Right to Work law violations. In any given factual situation, petitioner points out, a state court may construe the facts differently than

might the National Labor Relations Board and might find the existence of a violation under circumstances where the National Labor Relations Board would find no violation. This is fatuous reasoning and hardly provides a proper basis for denying state court jurisdiction. Absolute uniformity in regard to findings of facts or the application of rules of law to such facts is never possible so long as human beings are what they are. Even the vaunted uniformity of enforcement by the National Labor Relations Board is more fictional than real. It is well known that Board examiners and Board personnel differ in their approaches and outlooks and where one might find a given set of facts sufficient to warrant the issuance of a complaint, another would find the opposite. By the same token, absolute uniformity in the application of federal laws by federal courts is impossible of reality since there are 385 federal judges, each with his own individual characteristics. Some judges are known as strict judges while others are regarded as lenient, and where one might impose a severe penalty, another may, in the same circumstances, impose a relatively light penalty or no penalty at all. Consequently, the ideal of uniformity which the petitioner asserts is so necessary and desirable, is no more likely of achievement under an exclusive federal pre-emption rule than under any other rule.

Here again the petitioner seeks to apply a doctrinaire and inflexible rule of federal exclusivity when, upon analysis, it can be seen that there is no real necessity for absolute uniformity inasmuch as no federal policy will be infringed in any event, and even if such uniformity were desirable in an abstract sense, it is never possible of achievement.

In other federal statutes which spell out federal policies affecting labor and labor relations, Congress has not imposed strict pre-emption rules, and has, in fact, permitted concurrent state and federal jurisdiction. For example,

the Fair Labor Standards Act[8] which establishes minimum wages and maximum hours for employees engaged in interstate commerce provides that actions brought thereunder may be instituted in any court of competent jurisdiction, state or federal. As can be seen, a state court in considering questions of whether the provisions of the act apply to a given fact situation might reach a result different than would be reached by the Wage-Hour Administrator or by a federal court, or even by another state court. Such divergency does not, however, destroy or diminish the purposes or policies of the federal law, as petitioner claims would be the case here. It merely reflects the inherent nature of any adjudicative process. Other examples of concurrent state and federal enforcement of federal labor statutes would include the recently enacted Equal Pay for Women Act[9] and the Federal Employers Liability Act.[10]

The "grave consequences" which petitioner claims will follow from state enforcement are, as will be seen, purely imaginary. In the almost twenty years since Right to Work laws were first enacted by the states there have been no "grave consequences" attendant upon state enforcement, and there is no reason to expect that future enforcement will produce the "intolerable interference" which petitioner predicts. In any event, if any such results should occur, the argument by petitioner for a change should be addressed to Congress and not to the courts. It would be "intolerable interference" for a court to undertake by judicial fiat an amendment of the statute contrary to congressional intent.

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[8] 29 USC, sec. 201, et seq.

[9] Pub. L. No. 38, 88th Cong., 1st Sess. (June 10, 1963).

[10] 45 USC, sec. 56 "The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several states."

The fact is that no such conflict with federal administration of the National Labor Relations Act has developed. Since 1947 when the Taft-Hartley Act amendments were adopted eight additional states have elected to enact legislation to prohibit compulsory unionism in their areas. Such laws have enhanced industrial development in these states to the benefit of the working people and have been an important factor in reducing strife between unions and employers.

There is no doubt that Congress may if it sees fit circumscribe its regulation and occupy a limited field. Where it does so its intent to supersede state powers as to matters not covered by the federal legislation may in appropriate circumstances be implied. *Bethlehem Steel Co.* v. *New York Labor Relations Board*, 330 U.S. 767 (1947). With respect to union security agreements, however, there is no room for statutory implications or inferences, or for seeking out potential areas of conflict between federal policy and state enforcement. Nothing could be more evident than that Congress has deliberately and intentionally abandoned the field of the union shop and lesser forms of union security and left everything in connection therewith to the regulatory authority of the states. Having thus withdrawn from the field the federal government cannot with any logic claim to be the exclusive agency for enforcement of state statutes. The authority of the states to enact their laws cannot be separated from the conjunctive authority to enforce the laws. The entire history of jurisprudence is devoid of any example of such a separation of sovereign powers.

CONCLUSION

For the foregoing reasons the judgment of the Supreme Court of Florida should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 13

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL 1625, AFL-CIO, *et al.*, *Petitioners*,

v.

ALBERTA SCHERMERHORN, *et al.*, *Respondents*.

On Writ of Certiorari to the Supreme Court of Florida

REPLY BRIEF FOR PETITIONERS

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No. 13

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v.

ALBERTA SCHERMERHORN, *et al.*, *Respondents*.

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PETITIONERS' REPLY BRIEF

I. Since the Government Agrees that the States Have No Power to Regulate "Any Conduct" Which Might Violate State "Right-to-Work" Laws, the Issue Remaining is the Extent to Which State Remedial Power Has Been Preempted Over the Execution and Application of Contracts.

Although respondents have not filed a brief, the views of the Government and others have been expressed in briefs *amici curiae*.[1]

It appears that the Government is in accord with us on at least two major issues: 1) The States have "no jurisdiction over peaceful strikes and picketing under any cir-

[1] The amicus brief for some 18 "right-to-work" States makes no arguments which are not discussed in the Solicitor General's brief.

cumstances" (Govt. Br. 6, 37-38);[2] and 2) Concurrent exercise of remedial jurisdiction by both the National Labor Relations Board and the State courts "would inevitably give rise to the possibility of diverse or conflicting adjudications on the same facts," and "wise policy requires avoiding the possibilities of conflict" (Govt. Br. 56).

Although the Government's brief at least seven times says (as quoted above) that the States have been preempted of power to regulate strikes and picketing under any circumstances, the Government observes that there is a "second, but less satisfactory, solution" which would permit State court jurisdiction over such activities where they are "*unequivocally aimed* at an *immediate violation* of State laws" (Govt. Br. 40). Such a solution would, however, "create the very kind of danger that the *Garner* rule was intended to avoid," the Government correctly concludes (Govt. Br. 41). Since it is admittedly unsatisfactory and

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[2] The Government's views on this proposition are stated in a variety of ways throughout its brief:

(i) ". . . it is arguable that the States have no jurisdiction over peaceful strikes and picketing under any circumstances . . ." (Govt. Br. 6).

(ii) "This State jurisdiction . . . does not extend to any conduct that is found to tend towards violation, for that would plainly interfere with exclusive federal jurisdiction over other aspects of labor-management relations" (Govt. Br. 12).

(iii) "It seems plain . . . that the States' power does not extend to enjoining any conduct which the State finds has a tendency or purpose to bring about the execution of a union-security contract" (Govt. Br. 33).

(iv) "To allow State tribunals to take evidence upon the purposes of picketing in a controversy over union recognition or organization and then to issue injunctions whenever convinced that the union's ultimate objective was a closed or union shop agreement, would seriously interfere with the national labor policy in areas over which Congress left no jurisdiction in the States" (Govt. Br. 34).

contrary to the *Garner* rule, there appears to be no reason to give serious attention to this second "solution."

Because the Government shares our view that at the very least the States have "no jurisdiction over peaceful strikes and picketing under any circumstances" (Govt. Br. 6), and respondents have filed no brief, this reply may be limited to the issue of whether the States have power under § 14(b) to prevent and punish the *actual execution* and *application* of union security contracts in violation of "right-to-work" laws. The Government's position is that the States have unlimited remedial power (Govt. Br. 37-38), while we believe that exercise of such power by the States would interfere with the N.L.R.B.'s administration of the Labor Act and produce harsh and unintended anomalies.

Our disagreement with the Government stems from three main sources:

[continued.]

(v) ". . . if the States were permitted to enforce their right-to-work laws against strikes and picketing, there would be grave risk that many courts might find a forbidden union-security objective where the Board would find none imminent, and thus might punish or restrain conduct which the federal Act protects or at least leaves to the free play of economic forces. In order, therefore, to preserve the delicate balance between the interests of labor and management which the Act has drawn, Section 14(b) must be construed in such a way as to give the Board exclusive responsibility in this peculiarly sensitive area" (Govt. Br. 36).

(vi) "Plainly, there is no State power to deal with conflicts over union organization and collective bargaining merely because there is a claim and possibly some evidence that the union's ultimate objective is to secure the employment of union labor" (Govt. Br. 37).

(vii) "It might plausibly be argued that the States have no jurisdiction over peaceful strikes and picketing under any circumstances, but are limited to barring, punishing and redressing the actual execution of union-security contracts and discharges thereunder" (Govt. Br. 37-38).

1. The Government almost ignores the basic question raised by the Court in its order directing reargument: Does execution of a union security agreement in a "right-to-work" State violate §§ 8(a)(3) and 8(b)(2) of the federal Act? One must read the Government's brief to the end to find the Government's negative answer, yet the Government concedes that the words of the Act "will bear" the construction that § 14(b) operates as an added proviso to § 8(a)(3). We think the words of the Act will bear no other construction. Once this question is decided affirmatively, the only issue remaining is whether State jurisdiction must yield to the exercise of federal power by the N.L.R.B.

2. The legislative history on which the Government places its main emphasis is inapposite, whereas the Government ignores the history unfavorable to it.

3. The sharp and essentially arbitrary line which the Government would draw (*i.e.*, acknowledging State power to prevent and punish the "actual execution" of a union security agreement and discharges thereunder, but no power to deal with "any conduct" such as strikes or picketing) is utterly unrealistic. It can only result in misuse and confusion in the State courts which will not understand or respect such an artificial division of jurisdiction. The Government, conceding that its solution would involve *some* interference with federal regulation, asserts that the interference would not be *too great* or *undue*. Its position falls short of protecting the exclusivity of federal substantive law and procedures. The Government evidently disapproves or underestimates the holdings of this Court's preemption decisions in this area. We urge that the line separating federal and State power on this subject must be drawn more boldly and perceptibly to assure the integrity of federal law, while simultaneously achieving the Congressional object of authorizing the States to prohibit com-

pulsory membership contracts within the confines of the national labor policy.

II. The Government's Contention that Violation of a Right-to-Work Law is Not an Unfair Labor Practice Ignores the Words of the Act, Misreads the Precedents, and Misappraises the Relevant Legislative History.

Much of the Government's brief is devoted to discussing the wrong question, *i.e.*, whether Congress intended to deny the States power to enforce their "right-to-work" statutes.

The question asked by the Court, however, is *whether violation of a "right-to-work" statute constitutes a federal unfair practice.* Not until this question is answered is it useful to inquire whether the federal remedial power displaces State power; even then, the question is what did Congress intend when federal remedial power clashes with State power? The Government ignores the Court's question entirely until the end of its brief (Govt. Br. 47).

When it finally reaches the issue, the Government grudgingly admits that the language of the Act "will bear the construction" that execution or application of a union security contract in a "right-to-work" State is an unfair labor practice under §§ 8(a)(3) and 8(b)(2) (Govt. Br. 48). Notwithstanding this concession, and notwithstanding the fact that the Court in the instant case has suggested the logic of such construction (373 U.S. at 756), and that the N.L.R.B. has relied on such construction (*Giant Food Shopping Center, Inc.*, 77 N.L.R.B. 791), the Government's brief rejects it in large part on the ground that it is contrary to the "spontaneous understanding" of § 14(b) (Govt. Br. 47). The Government cites no authority which explains the

weight to be accorded a "spontaneous understanding."[3]

In addition to its "spontaneous understanding" the Government asserts that there are three "cogent" considerations for believing that execution of a union security agreement in a "right-to-work" State does not violate federal law: 1) It is "inherently unlikely" that Congress would have made the federal Board an instrument of State law; 2) The legislative history does not show that Congress intended to create this unfair labor practice; and 3) There is "compelling evidence" that Congress intended to permit the States to enforce their own laws (Govt. Br. 52-56). Individually and combined, these reasons are without substance.

The Government thinks it "inherently unlikely that Congress would have wished to make the federal agency an instrument of state policy" (Govt. Br. 52). This statement fundamentally misconceives the nature of § 14(b) and, in a larger sense, the flexibility of our federal system. The Congress which enacted § 14(b) made law for the whole United States. The statute embodies the "national labor policy," and here it was the judgment of Congress that this national policy would be promoted by the law of the individual States.[4] Such provisions are far from unique. See, e.g., the

[3] We are aware of no case in this or any other Court interpreting legislation on this basis or even explaining the meaning of that phrase. There is, however, a doctrine giving effect to the contemporaneous construction of legislation by officials charged with the duty of administering it. See e.g., Norwegian Nitrogen Products v. United States, 288 U.S. 294, 315; United States v. Leslie Salt Co., 350 U.S. 383, 396. The Government's attempt to avoid the effect of the NLRB's contemporaneous construction in Giant Food Shopping Center by reliance on the repeal of § 9(e)(1) is wholly specious.

[4] As this Court has said in discussing the balance struck by Congress with respect to union security arrangements, "it is the entire Act, and not merely one portion of it, which embodies 'the definite statement of the national policy.'" Machinists Union v. Labor Board, 362 U.S. 411, 417, n.7.

Federal Tort Claims Act, 28 USC §1346(b), which adopts as the basis for tort liability the "law of the place [i.e., State] where the act or omission occurred." When a federal court applies State law in a suit against the United States, is it enforcing *State* policy?

We need go no farther than §301 of the Taft-Hartley Act for another example. "[State] law, if compatible with the purpose of §301 may be resorted to in order to find the rule that will best effectuate federal policy. • • • Any State law applied, however, will be absorbed as federal law and will not be an independent source of rights." *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 457. See also *Board of Commissioners of Jackson County* v. *United States*, 308 U.S. 343, where this Court in fashioning a federal rule looked to State law.

Nor is it incongruous for the Labor Board to interpret State law in determining whether an unfair labor practice has been committed, for the Government's own theory assumes Board interpretation of "right-to-work" laws in §8(b)(3) cases (Govt. Br. 39). Federal courts constantly interpret State law. *Cf. Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64.

In *Giant Food Shopping Center, supra*, the Board refused to conduct a "union shop authorization election" under former §9(e)(1) in Virginia because of that State's "right-to-work" law. Since the right to enter into a union security contract then depended on the Board's first conducting an authorization election, the Board's refusal to conduct an election incorporated that State policy into the federal law of elections and union security agreements. The Government's explanation of this case is that the intervening repeal of §9(e)(1) removed it as a precedent and that the decision was based on policy rather than statutory interpretation (Govt. Br. 50-52). These distinctions are illusory.

The repeal of §9(e)(1) self-evidently has nothing to do with §14(b)'s integration into the rest of the Act. The decision was based on statutory command, not mere policy, for the Board feared that conducting an election in Virginia might require the Board to accept an agreement negotiated thereunder as "a defense to (a) . . . complaint alleging discriminatory discharges." (See Govt. Br. 51.)

The Government's second argument for avoiding the plain meaning of the statute is that Congress did not intend to put "federal sanctions behind State laws," for such a policy would have "attracted some comment" (Govt. Br. 53). Like its previous contention, this one, too, begs the question of whether Congress meant to do what it did and to say what it said in §§7, 8(a)(3) and 14(b). Apparently the Government is contending that explicit articulation of its awareness of a specific problem is a prerequisite to finding that Congress meant what it said. This is a novel principle of statutory interpretation. If this principle is sound, however, one may ask why the anomalous scheme of remedies which the Government attributes to Congress did not "attract some comment."

Third, the Government contends that there is "compelling evidence" that Congress intended to leave the States free to enforce their own laws (Govt. Br. 55). This is a bold characterization of weak evidence. The reality is that there is no evidence that Congress did not intend to treat §14(b) as a condition of §§8(a)(3) and 8(b)(2), and the language of these sections is the strongest evidence that Congress did.

The Government would draw meaning from Congress' choice of §8(a)(3) of the Senate bill, rather than §8(d)(4) of the House bill. The short answer is that the "House Conference Committee report explains the choice on other grounds" (Govt. Br. 55). Compare the Government's rejection of a similar inference at Govt. Br. 22-23.

Since the Government concedes that the language of the Act "will bear the construction" that it is a federal unfair practice to execute a contract in violation of a valid State law enacted under §14(b) (Govt. Br. 48) and that "the Board has never passed upon the question in a contested case" (Govt. Br. 52), executing such a contract is at the least *"arguably"* an unfair labor practice, requiring the States to "defer to the exclusive competence of the National Labor Relations Board." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, at 245.

We will not here repeat our affirmative argument of the relationship between §§8(a)(3), 14(b) and 7 (Pet. Br. 4-9), except to observe that the Government's brief seems unreasonably committed to avoiding the plain meaning of plain words.

III. The Legislative History Does Not Show that Congress Intended to Authorize the States to Interfere With or Supplement Federal Power to Remedy Unfair Labor Practices in this Area.

Taking the legislative history in the light most favorable to the Government, it is inconclusive. Mere bits and pieces of legislative history are cited in the Government's brief with great emphasis, even when they are no more than casually related to the subject. For example, one part of the legislative history on which the Government relies is an exchange between Congressmen Kersten and Hartley (Govt. Br. 25, 26). The Government says that this exchange has "*apparent* reference to Section 14(b)" (Govt. Br. 25; emphasis added). The exchange between these two Congressmen, edited and then quoted in the Government's brief, is as follows (1 Leg. Hist. of LMRA 883):

MR. HARTLEY: I yield.

MR. KERSTEN of Wisconsin. I wish to compliment the gentleman on the very fine exposition he is making of the conference report. I would like to ask the gentleman about that portion which pertains to the validity of State laws. Wisconsin and other States have their own labor relations laws. We are very anxious that disputes be settled at the State level insofar as it is possible. Can the gentleman give us assurance on that proposition, so that it is a matter of record that that is the sense of the language and of the report?

MR. HARTLEY. That is the sense of the language of the bill and of the report. That is my interpretation of the bill, that this will not interfere with the State of Wisconsin in the administration of its own laws. In other words, this will not interfere with the validity of the laws within that State.

MR. KERSTEN of Wisconsin. And it will permit as many of these disputes to be settled at the State level as possible?

MR. HARTLEY. Exactly.

When the whole exchange is considered, it is far from "apparent" that either man was referring to § 14(b); it is unlikely that they were even talking about the same thing. Since Congressman Kersten asked about permitting "as many of these disputes to be settled at the State level as possible," his concern was plainly not limited to the administration of Wisconsin's laws regulating union security arrangements, but was addressed to preserving generally the jurisdiction of the Wisconsin Employment Relations Board. Since Wisconsin was not even one of the "12 states [which] had enacted statutes or constitutional prohibitions

outlawing or restricting the closed shop" (Govt. Br. 18-19)[5] which §14(b) was designed to protect, there is strong evidence this colloquy did not involve §14(b) at all. In any event, Congressman Hartley's prophecy has not guided this Court's interpretations of State court jurisdiction under the Act. See, e.g., *LaCrosse Telephone Co.* v. *Wisconsin Board*, 336 U.S. 18; *Plankington Packing Co.* v. *Wisconsin Board*, 338 U.S. 953; *Plumbers Union* v. *County of Door*, 359 U.S. 354; *cf. San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236.

The statement made by Congressman Hartley just a few seconds before he was interrupted by Kersten dealt with the subject of "State laws," but assuredly it had no reference to §14(b) (1 Leg. Hist. of LMRA 883):

> This bill once again protects the validity of State laws on labor. Here is how we do it. This bill provides an addition to the present board of two members. In other words, it creates a board of five members.

On the basis of such unrelated scraps of history, the Government boldly asserts that the legislative history "shows beyond peradventure that Congress intended to leave the States free to exercise full concurrent jurisdiction over union security agreements" (Govt. Br. 4). Since there is not a single sentence in the legislative history which shows any Congressional awareness of this specific problem, it is unrewarding to search for Congressional opinion of a matter which was not considered. As Mr. Cox himself has admonished on this subject (Cox, Federalism in the law of Labor Relations, 67 Harv. L. Rev. 1297, at 1348):

> [It] is folly to search for straws in the statute or legislative history supposed to point to what went on in the mind of an imaginary average Congressman deliberat-

[5] See State Laws Regulating Union-Security Contracts, 21 LRRM 66, cited at Govt. Br. 19, n. 11.

> ing on a question that no one actually considered. Problems of federalism ought to be decided upon explicit consideration of the factors entering into a determination of policy, viewed from the standpoint of one sympathetic to the national labor policy embodied in existing legislation. The practice would not only lead to sounder solutions, but it would also encourage discussion helpful to the Court in future decisions and leading to a more informed body of opinion upon legislative review.

The Government's brief places some reliance on various statements in the legislative history to the effect that § 14(b) of the Taft-Hartley Act was not intended to change the pre-1947 federal policy with respect to State power. (See, *e.g.*, Govt. Br. 24, 26). This argument proves too much. The preemption doctrine depends on Congress' having occupied a field and upon the danger of conflicts in substance and procedure between federal and State authorities. The Taft-Hartley Act, unlike the Wagner Act, extensively regulated union activities for the first time. It was Congress' comprehensive regulation in the Taft-Hartley Act which vastly expanded the federal regulatory field necessitating broad preemption.

But however broadly or narrowly one reads the legislative history of § 14(b), it is impossible to find any support in it for the sharp and arbitrary line which the Government would draw between State and federal power in this case. What specific legislative history supports the Government's view that the States have "no jurisdiction over peaceful strikes and picketing under any circumstances" (Govt. Br. 6, 12, 33, 34, 36, 37, 38), but that the States have power to "enjoin or punish the execution of a union security agreement and award damages to any person injured

thereby" (Govt. Br. 32-38)?[6] What legislative history supports the Government's view that during a strike a State might enjoin an employer from executing a union shop contract, but might not "prevent the union from using economic pressure" of the strike to compel agreement on such a contract" (Govt. Br. 39)? There is none, of course.

The development of the law of preemption of interstate labor relations since 1947 makes it an exercise in fantasy to look back to the legislative deliberations then, innocent of all that has happened in the interim. "The issue was scarcely perceived until 1947 and has only become acute since 1950."[7] Our opening brief summarizes the holdings of some 20 leading cases of this Court which have held State power, remedial as well as substantive, to be preempted by the federal Act to avoid a conflict. These cases are part of the administrative flesh and blood of the Act, and it is senseless to look at this as though those cases had never been decided and as though this were 1947.[8]

While the 1947 Congress was aware that some 12 States then had enacted "right-to-work" laws, there is not one word in the entire legislative history to show any Congressional awareness that these statutes provided criminal sanctions or other kinds of remedies. To suppose that Con-

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[6] The Government's brief itself correctly notes that prior to 1947 the States "were applying their own laws to strikes and picketing, and there was little, if any, thought given to the possibility that the enactment of Section 8(b) might occupy the field" (Govt. Br. 28).

[7] Cox, Federalism in the Law of Labor Relations, 67 Harv. L. Rev. 1297, at 1347.

[8] For this reason, little attention need be given to "contemporary commentators" who in 1947 and 1948 were barely able to do more than paraphrase Congress' own words, since the Act had not received any authoritative interpretation. (See Govt. Br. 31.)

gress, nevertheless, was aware of such State remedies and intended such remedies to be applicable, even where the N.L.R.B. might independently provide a remedy under §§ 8(a)(3) and 8(b)(2) to the identical conduct, requires a series of improbable and speculative inferences. Unless one views this case as a jig saw puzzle, and attempts to fit odd pieces of the 1947 legislative history into the 1963 mold, whether or not they fit, the legislative history does not greatly aid the resolution of this case.

Finally, although we will not here restate the arguments of our opening brief that the substitution of present § 14(b) for the language of § 13 of H.R. 3070 is a deliberate deletion of State remedial power in this area, the Government's brief attempts to evade the argument by speculating that Congress simply preferred the "more concise" language of §14(b) (Govt. Br. 22). The reality of the change is more important, we believe, than the Government's speculation.

IV. Whether Or Not Violation of A "Right-To-Work" Law Per Se Violates §8(a)(3), the Danger of Substantive Conflict With the Federal Act Requires That the Federal Board's Jurisdiction Be Exclusive.

The exclusive primary jurisdiction of the Board to enforce State prohibitions against union shop agreements in interstate commerce is necessary to avoid substantial conflicts in the interpretation of the national Act.

Though leaving open the question whether the § 8(a)(3) proviso and § 14 (b) are "perfectly coincident" (373 U.S. at 751); the Court's opinion in this case made quite clear that § 14(b) comes into play only with respect to activities which would be unfair labor practices but for the § 8(a)(3) proviso. That is what the Court *said*, 373 U.S. at 751 and 756, and what it *did*, since it looked to its interpretation of

the proviso in *General Motors* (373 U.S. 734) as controlling on the validity of the agency shop herein, 373 U.S. at 751 and 755. Thus, implicit in any application of § 14(b) is an interpretation of the § 8(a)(3) proviso. Once this is recognized, the exclusivity of Board jurisdiction follows inescapably from *San Diego Bldg. Trades* v. *Garmon*, 359 U.S. 236, for the interpretation of the first proviso of § 8(a)(3) is grist for the Board's mills. See, e.g., *American Seating Co.*, 98 NLRB 800, cited with approval in *Labor Board* v. *General Motors*, 373 U.S. at 742.[9]

If, in the guise of exercising power under § 14(b), the States were to interpret the § 8(a)(3) proviso for themselves, they might regulate conduct which is not protected by that proviso and, thus, remedy an unfair labor practice. That States may not do this was settled even before *Garner* by *Plankington Packing Co.* v. *Wisconsin Board*, 338 U.S. 953. On the other hand, since the States' power under § 14(b) extends only to making rules with respect to discrimination for union non-membership,[10] the States might err in the opposite direction and proscribe conduct which is lawful under the federal Act but not left to the States by § 14(b). Compare *Teamsters Union* v. *Labor Board*, 365 U.S. 667 (union exclusive hiring hall not per se illegal under federal law), with *Kaiser* v. *Price-Fewell, Inc.*, 235 Ark. 295, 359 S.W. 2d 449, cert. denied 371 U.S. 955 (union exclusive

[9] The meaning of the § 8(a)(3) proviso often involves close and delicate questions, as for example in the dues tender cases which perennially trouble the Board. See, e.g., Aluminum Workers, 112 N.L.R.B. 619, enforced 230 F. 2d 515 (CA 7), but disapproved in IAM v. Labor Board, 247 F. 2d 414 (CA 2), and N.L.R.B. v. Technicolor Motion Picture Corp., 238 F. 2d 348 (CA 9). Aluminum Workers was substantially overruled in General Motors Corp., 134 N.L.R.B. 1107. See also Philadelphia Sheraton Corp., 136 N.L.R.B. 888, 895-97; Colgate Palmolive Co., 138 N.L.R.B. 1037, 1038-39.

[10] In other words the exercise of jurisdiction under § 14(b) assumes an interpretation of § 8(a)(3) itself as well as of the union shop proviso.

hiring hall illegal under state law). See also the examples cited in Pet. Br. 18.

For these reasons, this Court's delineation in its earlier opinion of the relationship between the § 8(a)(3) proviso and § 14(b) is dispositive of the question. The failure of the Government and the State Attorneys General even to advert to this discussion is a telling admission, for what this Court has already said in this case would seem a necessary point of departure for any argument, whatever its ultimate destination. But what the Government *does* say likewise requires the conclusion that the applicability of § 14(b) turns on a determination which is committed exclusively to the Board. The Government acknowledges that if a union "were to execute a union-shop contract even though it had not been designated as the bargaining representative, the national Board would have jurisdiction to deal with its activities as violations of § 8(b)(2), for its conduct would not meet the conditions expressly stated in the proviso to Section 8(a)(3) (Govt. Br. 43). The precise language of the proviso referred to here is "if such labor organization is the representative of the employees as provided in Section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made. . . ."

Whether a union is such "representative" is a determination committed exclusively to the Board, as Congress well knew in enacting § 8(a)(3), since this Court had so held in the *Bethlehem Steel* case,[11] which Congress had very much in mind in delineating State and federal authority. See *Amalgamated Association* v. *Wisconsin Board,* 340 U.S. 383, 397-398. Thus, even under the Government's theory, a State's determination that it has jurisdiction, because a union has executed a union-security contract, assumes that

[11] Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767. The treatment of this case at Govt. Br. 4, n. 3, is incomprehensible.

the union is the § 9(a) representative, although the Board might hold otherwise, with the result that this conduct would be an unfair labor practice and outside § 14(b).

The avoidance of such substantive conflicts was one of the reasons that Congress entrusted the Board with exclusive primary jurisdiction in the administration of Title I of the Act. We cannot accept the Government's contention that the possibility of such conflict is of concern only, or mainly, where the union is engaged in strikes or picketing (Govt. Br. 32-42). On the same day that reargument was ordered herein, the Court in two cases applied *Garmon* to non-strike situations, *Plumbers' Union* v. *Borden*, 373 U.S. 690; *Iron Workers* v. *Perko*, 373 U.S. 701. In the *Plumbers'* case, the Court expressly observed that the exercise of state jurisdiction might result in the sacrifice of § 7 rights. 373 U.S. at 695. Thus the tortured effort to limit the authority of *Curry and Farnsworth* to picketing cases (Govt. Br. 33-39) avails naught.[12] There is, as we have remarked before, no distine-

[12] The suggestion (Govt. Br. 38, n. 25) that the Curry and Farnsworth decisions were made on inadequate consideration and are therefore not authoritative precedents merits but brief comment. First, we have never understood the stare decisis effect of this Court's statutory interpretations to depend on the quality of the briefs. Second, respondent's brief in Curry devoted an entire section to preemption (Br. for Respondent, No. 87, Oct. Term 1962, pp. 16-26). Respondent relied specifically on § 14(b), on the Algoma decision and, most significantly, on the same language in the House Conference Report which is the Government's main reliance here (see Govt. Br. 23). In reply petitioner distinguished Algoma and expressly relied on Farnsworth & Chambers (see Reply Br. for Petitioners, No. 87, Oct. Term, 1962, pp. 2-4).

Contrary to the Government's view, we think the Court's opinion in Curry devoted the discussion to the § 14(b) issue which it required, for the question had already been decided in Farnsworth & Chambers. In the latter case, one of the "Questions Presented" had been whether § 14(b) preserved to the States jurisdiction over picketing which was protected or prohibited under the Act; respondent had relied heavily on Algoma (see petition for certiorari and brief in opposition pp. 3-5, No. 891, Oct. Term, 1957).

tion in the statute, in the legislative history, or in principle as to the need for Board exclusivity with regard to strikes and picketing on the one hand and the execution or administration of collective agreement on the other.

Nor is there any need to reconcile *Curry* and *Farnsworth* with *Algoma Plywood Co.* v. *Wisconsin Board*, 336 U.S. 301, for that case was superseded as to State jurisdiction by *Garmon*. In *Algoma* the Court wrote: "Where the State and federal laws do not overlap, no cession is necessary because the State's jurisdiction is unimpaired." 336 U.S. at 313. One week earlier, the Court had said "There is no existing or possible conflict or overlapping between the authority of the Federal and State Boards, because the Federal Board has no authority either to investigate, approve or forbid the union conduct in question." *Auto Workers* v. *Wisconsin Board*, 336 U.S. 245, 254. In both opinions the Court examined whether the activity was either protected or prohibited by federal law, and, concluding that it was not, sustained State jurisdiction. But *Garmon* rejected the view that the Board's exclusive primary jurisdiction was limited to situations in which this Court has found an "overlap"; it is sufficient that the subject matter be "arguably" protected by § 7 or prohibited by § 8, and this Court will not determine for itself whether § 7 or 8 actually applies. In so holding, the Court expressly overruled the *Auto Workers* case, *supra*, see 359 U.S. 245, 4, as was again remarked in *Labor Board* v. *Insurance Agents*, 361 U.S. 477, 493, n. 23. When *Auto Workers* fell, its companion [13] *Algoma* came tumbling after.[14]

The circumstance that *Algoma* involved § 14(b) cannot save it, for the sole context in which § 14(b) was there con-

[13] The cases were argued in succession (see U.S. Sup. Ct. Journal, Nov. 18, 1948) and were undoubtedly considered together.

[14] While their view cannot be controlling it is noteworthy that the dissenters from the Garmon holding believed that the majority had overruled Algoma. See 359 U.S. at 253.

sidered was in determining whether the agreement was protected by federal law, and thus excluded from State jurisdiction by virtue or the "overlap" theory. Indeed, at the time of *Algoma* the question now before the Court would have been meaningless. For until it was fully appreciated that the exclusive jurisdiction of the Board has purposes other than the avoidance of substantive conflict, the method of the *Auto Workers* and *Algoma* cases was reasonable and satisfactory. But beginning with *Garner*, 346 U.S. 485, 490-91 (quoted at Pet. Br. 15), the Court took a broader view. As was said in *Garmon*, 359 U.S. 236 at 243, "We have been concerned with conflict in its broadest sense, conflict with a complex and interrelated *federal scheme of law, remedy, and administration.*" Yet the Government asserts that "the exclusivity of the jurisdiction of the National Labor Relations Board, including the exclusivity of its remedial powers, rests upon the need for ensuring that the substantive rules laid down by Congress are given uniform application (Govt. Br. 42, 43). When *Algoma* was decided this narrow view would have been acceptable; today, after *Garner* and *Garmon*, it is startling.

Thus, even if the Court does not determine independently that the violation of State laws authorized by § 14(b) constitutes an unfair labor practice, the avoidance of conflict in the interpretation of the Act requires that Board jurisdiction be exclusive. In the next section we show that the result is required also if a serious conflict of remedies is to be avoided.

V. The Government's Arbitrary Line for Separating Federal and State Power Is So Tenuous and Anomalous That It Would Be the Source of Great Mischief and Confusion As a Matter of Remedies.

The Government's position that § 14(b) grants the States power to prevent, remedy and punish the "actual execution" of a union security agreement and its application,

but no power over peaceful "conduct" tending to violate a State "right-to-work" law (Govt. Br. 32-39), is academically contrived and arbitrary. It is not supported by the legislative history, and it rubs hard against the grain of the preemption doctrine. Indeed, nowhere does the Government explain why it comports with Congress' intention to preempt the States of any regulatory power over strikes and picketing to achieve contracts which would violate State laws. Presumably the Government feels bound by this Court's picketing cases involving "right-to-work" States, although it may not regard them as well considered (Govt. Br. 37-38, n. 25).

Serious and irreconcilable anomalies inhere in the Government's scheme. Although the Government gracelessly charges that it is "Congress' anomalous decision to allow State intrusion into an area as close to the heart of labor-management relations as union security" (Govt. Br. 32) which is the source of the Government's analytical problems, it seems more likely that the Government has created anomalies in Congress' name which Congress would have thought to be intolerable.

A closed shop agreement is a violation of §§ 8(a)(1) and (3), and 8(b)(1)(a) and (2) in *any* State. A union shop, however, under the Government's view would be lawful in every State, including "right-to-work" States. If States have power to remedy the execution of contracts in violation of their "right-to-work" laws, one would only commit an unfair labor practice by executing a closed shop agreement in Georgia (because the State would be preempted of regulatory power by virtue of the plain unfair labor practice), whereas one would commit a crime and could be imprisoned for executing a union shop agreement in that same State.

Another anomaly in the Government's position is this. Suppose a *minority* union enters into a union security con-

tract in a "right-to-work" State. Undoubtedly, as the Government concedes (Govt. Br. 39) executing such a contract with a minority union would constitute an unfair labor practice in any State under §§ 8(a)(1) and (3), and 8(b)(1)(A) and 8(b)(2). But, if it is a *majority* union which enters into the union security contract in a "right-to-work" State, there would be no federal unfair practice under the Government's view, and the State courts could uninhibitedly remedy the State law violation. This egregious result surely could not have been intended.

A grave practical weakness under the Government's proposal is that "a State might enjoin an employer from executing a union shop contract yet be powerless to prevent the union from using economic pressure to compel him to violate the decree or to pressure him for complying with the statue" (Govt. Br. 39). Although the Government suggests that this anomaly is more apparent than real, the contrary is the case. Indeed, according to the Government, a State court would have no power to enjoin a strike which includes among its objects violation of a "right-to-work" law, but it would have power—during the strike—to enjoin the employer and the union from entering into the very contract which the union seeks by its unenjoinable strike to compel the employer to execute. It is inconceivable that State court judges will respect the nicety of any such line once it is conceded that they have power to enjoin parties from entering into such a contract and to punish or redress the parties for actually applying such contract.

Although conceding that there "would be serious danger of interference with national policy if a State tribunal were permitted to interfere with the course of bargaining between an employer and the representative of his employees" (Govt. Br. 40), the Government is willing to let the State courts enjoin the execution of a particular contract, in advance of any agreement on its terms (Govt. Br. 32).

Conceding that its scheme would necessarily interfere with the national labor policy, the Government argues, it "will not greatly interfere" (Govt. Br. 28) or "unduly" (Govt. Br. 44). This is a novel and unprecedented approach to pre-emption. See Cox, Federalism in the Law of Labor Relations, 67 Harv. L. Rev. 1297, 1317. Compare *Guss* v. *Utah Board*, 353 U.S. 1.

The confusion which the Government's proposal would generate might take many years and a series of cases before this Court to clarify. Even the theoretical expression of the Government's proposed policy is difficult to understand, and its actual application will be many times more difficult. The dual Congressional objectives of preserving the integrity of federal law and procedures while permitting the States to prohibit compulsory membership agreements can best be fulfilled by exclusive administration of §§ 7, 8(a)(3) and 14(b) by the federal Board, taking State law into account.

Our opening brief discusses the severity of remedies provided by the State "right-to-work" laws (Pet. Br. 11-12). These remedies are totally incongruous with remedies provided by the federal Act, and there is no reason to think that Congress would have intended to authorize the States to apply such extremely diverse and punitive remedies. The Government's response to this argument is that there is no federal policy in favor of cease and desist orders (Govt. Br. 44). There obviously *is* a federal policy in favor of cease and desist orders to remedy unfair labor practices, for the purpose of the Act is remedial, not punitive. *Republic Steel Corp.* v. *Labor Board*, 311 U.S. 7, 10-12. Since § 14(b) is inextricably interwoven with the rest of the Act, the remedies applied thereunder must harmonize with remedies provided under other sections of the Act. See also *Phelps Dodge Corp.* v. *Labor Board*, 313 U.S. 177, 193-195.

Since the enactment of the Norris-LaGuardia Act in 1933, 47 Stat. 70, 29 USC § 101 *et seq.*, Congress has repeatedly expressed concern over the application of remedies to labor relations in interstate commerce. Sections 10(c), (j), and (l) reflect Congress' concern in the Taft-Hartley Act itself that the remedies employed by the Board and the federal courts be carefully tailored to their immediate purpose. When Congress intended to authorize private parties to bring actions for violations of the federal Act, it did so quite explicitly, as in § 302(e). When Congress intended to permit private suits in States courts to remedy violations of federally created rights, it similarly did so very explicitly, as in § 303(b). See *Bakery Drivers* v. *Wagshal*, 338 U.S. 437. Under Section 10(a) the N.L.R.B. may not even cede jurisdiction to the States unless the State laws are consistent in all respects—including, quite importantly, remedies.

As recently as in *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, the Court reviewed the entire subject of remedies applicable to labor disputes in interstate commerce, concluding that Congress does not lightly confer remedial power on any courts in this volatile field. Does it make sense to suppose that a Congress which has always been extremely sensitive to remedies would, without ever saying so, give the States carte blanche power to remedy the execution or application of a union security contract in commerce? Would such a Congress give the State courts unqualified power to imprison, fine, enjoin and grant various kinds of damages against parties in commerce merely for executing an agency shop contract (valid everywhere under federal law), while making execution of a closed shop contract by the same parties in the same State an unfair labor practice remediable only by the N.L.R.B.? The Government's view would compel the conclusion that Congress, knowingly but silently, intended foolish and incongruous results under § 14(b).

CONCLUSION

For the foregoing reasons the judgment of the court below should be reversed.[15]

Respectfully submitted,

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[15] The complaint in the instant case asks an injunction against "a strike or lockout of the employees as a means of enforcing" the agency shop clause in question (R. 6). Although it notes this problem, the Government does not suggest that this is beyond State power; instead, the Government argues that the "heart of the relief" sought here does not involve a strike (Govt. Br. 36-37).

We cannot reconcile the Government's proposal for the disposition of all other cases with its proposal for dealing with the instant case. How can the Government expect others to understand and to apply fairly a rule which the Government itself ignores at the earliest possible opportunity?